Criminal Law
INVOLUNTARY MANSLAUGHTER

A Consultation Paper

CONSULTATION

LAW COMMISSION
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The Law Commission

Consultation Paper No 135

Criminal Law

Involuntary Manslaughter

A Consultation Paper

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INVOLUNTARY MANSLAUGHTER

PART I

SCOPE AND BACKGROUND OF THE PROJECT

A. The framework in which the project is set

1.1 This Consultation Paper is concerned with that part of our criminal law which is called, perhaps not entirely happily, "involuntary" manslaughter. The law of involuntary manslaughter today has two, separate, main branches:[1] causing death in the course of doing an unlawful act and causing death by an act of recklessness or by "gross negligence".

1.2 The Paper is *not* concerned with those parts of the law of manslaughter (sometimes collectively called the law of *voluntary* manslaughter) which depend on the presence of the necessary mens rea for murder, and are therefore most easily regarded as partial defences to a charge of murder. The law of killing whilst under diminished responsibility,[2] the law of killing whilst under provocation[3] and killing by a survivor of a suicide pact[4] are therefore not discussed in the Paper.

1.3 We believe we should explain the reasons why we have decided to limit the scope of this new law reform project in this way. In 1989 we published our report on a Criminal Code for England and Wales.[5] This represented the culmination of eight years of work which had the central purpose of making the criminal law more accessible, comprehensible, consistent and certain. The Code was not in itself an exercise in law reform, although it included among its provisions certain unimplemented recommendations for law reform made in recent years by official bodies, including ourselves, or by ad hoc committees whose recommendations carried weight.

1.4 We are now embarked on the next part of this major exercise, which is to take different areas of the criminal law and to subject them to critical scrutiny with a view to producing a series of discrete law reform Bills, each complete in themselves, and ready for immediate implementation. These will also serve, once they have passed into law, as the material for consolidation into the complete Criminal Code which this country so badly

[1] A third topic, killing by an act of subjective recklessness, has recently fallen into this area, and is considered at paras 5.16-5.21 below.

[2] Homicide Act 1957, s 2.

[3] *Ibid*, s 3.

[4] *Ibid*, s 4.

[5] Criminal Law: A Criminal Code for England and Wales, (1989) Law Com No 177.

needs.[6] In November 1993 we published a report, on non-fatal Offences against the Person and General Principles, which formed the first stage of this part of our work.[7] This report received support on its publication[8] which was just as enthusiastic as the support we received at its consultation stage,[9] and it is now available to be enacted as soon as Parliament can find the time for such an essential and much-needed piece of criminal law reform.

1.5 Logically, the next stage of our work would be a review of the entire law of homicide, because it would be unthinkable that a modernised statutory code for non-fatal offences could exist for long alongside the present law of homicide, consisting as it does for the most part of antique and unreformed common law concepts. However, we are not now embarking on a project on that scale for two reasons.

1.6 The first is that our experience over the years has shown us that it is more prudent to proceed by slow degrees, subjecting discrete but important parts of the law to critical examination on their own, while bearing in mind the framework of law which surrounds them. The use of this technique ensures that individual law reform projects can be completed within a reasonable time scale.

1.7 The second, and perhaps more cogent, reason is that the law of murder has been subjected to critical scrutiny by very expert bodies twice in the last fifteen years.[10] We incorporated into our draft Code the Criminal Law Revision Committee's recommendation for a statutory definition of murder which was along the following lines:

> A person is guilty of murder if he causes the death of another -
>
> (a) intending to cause death; or
>
> (b) intending to cause serious personal harm and being aware that he may cause death...[11]

[6] For a fuller statement of this policy, see Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218 (hereafter referred to as Law Com No 218), at paras 1.1-1.4.

[7] Law Com No 218.

[8] See, for example, the speech of Lord Wilberforce, Debate on the Address, *Hansard* (HL) 23 November 1993, vol 550, cols 158-161, and the comments of the editor, *Archbold News* Issue 10, November 26 1993 at pp 4-5.

[9] Law Com No 218, pp 4-5.

[10] Criminal Law Revision Committee, Fourteenth Report, Offences against the Person (1980) Cmnd 7844, pp 7-44; Report of the House of Lords Select Committee on Murder and Life Imprisonment (1989) HL Paper 78-I.

[11] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, Draft Bill, clause 54.

1.8 Although this recommendation was endorsed by the House of Lords Select Committee in 1989,[12] the Government has made it clear, in the face of continuing well-informed pressure, that it sees no reason to alter the present constituents of the law of murder, nor indeed, to alter the mandatory sentence for murder which has given rise to a great deal of controversy in recent times. In those circumstances, we took the view that it would not be a justified use of our resources to return so soon to that part of the law of homicide, although it is inevitable that we will have to come back to it sooner or later. We have therefore limited the scope of the present project to a discrete part of the law of homicide which is urgent need of a study of this kind, as we will explain below.

1.9 The preparation of this Paper had reached an advanced stage of completion by the time Richard Buxton QC (now Mr Justice Buxton) left the Commission at the end of 1993. Although the present Commissioners are responsible for it in its final form, they owe a considerable debt of gratitude to their former colleague for the depth of learning and understanding of the criminal law which permeates its pages.

1.10 As we have said,[13] the law of involuntary manslaughter now has two separate branches. They are, however, both branches of the same tree. Lord Atkin observed in *Andrews v Director of Public Prosecutions*[14] that the law of homicide had gradually evolved from the early days, when any homicide involved penalty, to a point where it recognised murder on the one hand, based mainly, though not exclusively, on an intention to kill; and manslaughter on the other hand, based mainly, though not exclusively, on the absence of that intention, but with the presence of an element of "unlawfulness", an elusive factor.

1.11 One aspect of that unlawfulness was an unlawful failure to take due care. Lord Atkin said:

> [In old cases] expressions will be found which indicate that to cause death by any lack of due care will amount to manslaughter; but as manners softened and the law became more humane a narrower criterion appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence.[15]

This softening of the law was illustrated by a case in 1807[16] in which a medical man was charged with manslaughter. Lord Ellenborough directed the jury that to substantiate

[12] *Ibid*, at p 26.

[13] See para 1.1 above.

[14] [1937] AC 576.

[15] *Ibid*, at p 581-2.

[16] *Williamson* (1807) 3 Car & P 635; 172 ER 579.

the charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.

1.12 We will discuss in Part III of this Paper the development of this line of authority in the twentieth century, through such cases as *Bateman*,[17] *Andrews v DPP*,[18] and *Seymour*[19], to *Prentice*.[20] For present purposes it is sufficient to note that, like the present *genus* of "unlawful act manslaughter", "gross negligence" manslaughter also has as its origin what the members of the Home Secretary's Criminal Law Revision Committee described as "a savage early doctrine by which every killing in the course of an unlawful act was murder and as such capital".[21]

1.13 This doctrine was founded on the long since discredited principle of constructive liability. Under this doctrine, if the defendant is proved to have committed one crime, he may be held constructively liable for the consequences of that crime, without any necessity to prove criminal culpability on his part in respect of those consequences. Until Parliament intervened in 1957,[22] this antique common law doctrine produced the result that a defendant might be convicted of murder and sentenced to capital punishment if death resulted in the course of a felony on which he was engaged, even though by no stretch of the imagination could he have been said to have possessed the mens rea sufficient to convict him of the crime of murder. Thus in 1943, in the leading case of *Larkin*,[23] Humphreys J said:

> Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter. *If, in doing that dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder.*[24]

[17] (1925) 19 Cr App R 8.

[18] [1937] AC 576.

[19] [1983] 2 AC 493.

[20] [1993] 3 WLR 927.

[21] Criminal Law Revision Committee, Fourteenth Report, Offences against the Person (1980) Cmnd 7844, para 123, in which the committee characterised all the present applications of the unlawful act doctrine, including gross negligence manslaughter, as pale survivors of that savage early doctrine.

[22] Homicide Act 1957, s 1(1).

[23] (1944) 29 Cr App R 18.

[24] *Ibid*, at p 23 (emphasis added).

1.14 Although Parliament has abolished the principle of constructive liability in relation to *murder*, it remains the basis of the offences which are now called "unlawful act" and "gross negligence" involuntary manslaughter. Provided that the necessary criteria for admission to liability are fulfilled, then the prosecution does not have to establish any mens rea in relation to the death which was the consequence of the unlawful act or of the gross negligence. One may cause incurable brain damage by gross negligence without any criminal culpability, but if death should result from that gross negligence, then, through the operation of the doctrine of constructive liability, the criminal offence of manslaughter may have been committed. It is hardly surprising that in 1965 Lord Parker CJ described the law of involuntary manslaughter as illogical,[25] since the culpability is the same whether or not death results from the initiating act (or omission).

1.15 In the last fifty years the courts have struggled with the task of developing on such insecure foundations a law which is as consistent and coherent as practicable without doing undue violence to the principle that the courts can only develop, they cannot remake, the law. In Part II of this Paper we will describe the way in which, through such leading cases as *Church*,[26] *Lamb*,[27] and *Newbury*,[28] the courts endeavoured to introduce into the law of unlawful act manslaughter rules relating to mens rea which undoubtedly possessed the merit of being at least more respectable than those which preceded them. These efforts were not, however, sufficient to dissuade the Criminal Law Revision Committee in 1980 from recommending, with only one dissentient, the root and branch abolition of all forms of involuntary manslaughter.[29]

1.16 No steps were taken, however, to implement this recommendation, and since 1980 the courts have continued to try and retain consistency and coherency in this very unsatisfactory part of our law. In Part II we describe how the courts have continued to be concerned with oddities connected with the nature of the required causal link between the initiating act and the resulting death;[30] and with the question whether the initiating act must have been directed in some way at the deceased.[31] There can be no doubt that the ingenuity of the judges has resulted in the creation of a law of unlawful act manslaughter which does not face the same barrage of judicial criticism as the law relating to non-fatal offences against the person with which we have been recently

[25] *Creamer* [1966] 1 QB 72.

[26] [1966] 1 QB 59.

[27] [1967] 2 QB 981.

[28] [1977] AC 500.

[29] With the exception, that is, of cases where a person causes death with intent to cause serious injury (which are still embraced at present by the offence of murder) or cases where he or she is (subjectively) reckless as to death or serious injury: Criminal Law Revision Committee, Fourteenth Report (1980) para 124.

[30] *Watson* [1989] 1 WLR 684.

[31] *Dalby* [1982] 1 WLR 425; *Pagett* (1983) 76 Cr App R 279; *Goodfellow* (1986) 83 Cr App R 23.

concerned. But it rests, as we have observed, on very shaky foundations. Our determination to subject this branch of the criminal law to critical scrutiny was reinforced by the recent events which we now describe.

1.17 On 29 April 1993 a division of the Court of Appeal (Criminal Division) had no hesitation in quashing the wrongful conviction of the licensee of a public house who had used force when taking steps to remove the deceased from his public house.[32] He had been convicted of unlawful act manslaughter. In delivering judgment, the court, headed by a former Chairman of this Commission,[33] said:

> This unfortunate miscarriage of justice might well have been avoided if the clear advice of the Criminal Law Revision Committee's 14th Report, *Offences against the Person* (Cmnd 7844 (1980)), had been implemented. That distinguished committee recommended abolition of the antiquated relic of involuntary manslaughter based on the commission of an unlawful act and the adoption of the more rational and systematic approach to the offence of manslaughter they proposed. The present law is in urgent need of reform in spite of recent judicial attempts to make the law more compatible with a modern system of criminal justice...[arguments in the case are] merely indicative of the difficulty the jury had in understanding the concept of manslaughter based on unlawful act in the circumstances of this case. We conclude by expressing the hope that serious consideration will now be given to implementing proposals for a more modern and rational approach to the law of manslaughter.[34]

1.18 If this was not enough to justify the study on which we are now embarked, another division of the same court, headed by the Lord Chief Justice, returned to the subject in the same week[35] when quashing three out of four convictions for gross negligence manslaughter. In each of the three cases under review very experienced high court judges[36] had done their best to direct the jury according to what they understood to be the present state of the law. Lord Taylor CJ ended the judgment of the court by saying this:

> Before parting with these cases, the state of the law of manslaughter prompts us to urge that the Law Commission take the opportunity to examine the subject in all its aspects as a matter of urgency... . In 1992, the Law Commission in Legislating the Criminal Code reported on Offences against

[32] *Scarlett* [1993] 4 All ER 629.

[33] Beldam LJ.

[34] [1993] 4 All ER 629, 631E-F and 638A.

[35] *Prentice* [1993] 3 WLR 927.

[36] Owen, Alliott and Boreham JJ.

> the Person and General Principles in Consultation Paper No 122, but that excluded both murder and manslaughter. At paragraph 2.10 they say there are many aspects of the law of homicide that require attention from the point of view of law reform.
>
> These cases exemplify the problems in this particular type of manslaughter. Others have recently been highlighted in *R v Scarlett*, where another division of this court also urged that the law of manslaughter be reviewed. We hope that our comments here will reinforce the comments made in that case.[37]

1.19 We had already decided in principle to embark on this study, but these urgent promptings from two different divisions of the court most intimately concerned with administering the criminal law, and with most practical experience of the present state of that law, added a sense of immediacy to our decision to undertake this work.

1.20 As we have already said, the Criminal Law Revision Committee recommended in 1980 that involuntary manslaughter in all its aspects[38] should be abolished.[39] Since 1980, however, the Court of Appeal has continued in its attempts to rationalise unlawful act manslaughter; and a series of disasters leading to considerable loss of life, particularly in the area of public transport,[40] and one unsuccessful prosecution for manslaughter arising out of such a disaster,[41] have caused a reawakening of public interest in the possible use of gross negligence (or reckless) manslaughter in such cases. It was therefore clear to us that we could not simply adopt the 1980 recommendation, as we did in the 1989 Criminal Code,[42] but that we must subject both aspects of the law to critical scrutiny. Part II of this Paper contains, therefore, an up to date study of unlawful act manslaughter, and Part III is devoted to the present law of gross negligence manslaughter.

1.21 A prominent feature of the new interest in the law of involuntary manslaughter is the question whether the corporations which control the activities in which the much-publicised deaths, referred to in the preceding paragraph, occur can themselves be prosecuted for manslaughter. This is an issue of considerable importance, complexity and controversy, which we review in Part IV. Part V is concerned with the issues for reform

[37] *Prentice* [1993] 3 WLR 927, 952G-953B.

[38] Apart from those noted in n 29 to para 1.15 above.

[39] The committee was so clear in its views that it devoted less than two pages of text to this subject, notwithstanding that both the Senate of the Inns of Court and the Bar and the Prosecuting Solicitors' Society of England and Wales had given evidence to contrary effect: see Fourteenth Report, pp 56-57.

[40] Eg the sinking of the *mv Herald of Free Enterprise* at Zeebrugge in 1987 (189 deaths); the Kings Cross underground fire in 1987 (31 deaths); the Clapham railway crash in 1987 (34 deaths); the sinking of the *Marchioness* pleasure-boat on the Thames in 1989 (51 deaths).

[41] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[42] Criminal Law: A Criminal Code for England and Wales, Law Com No 177, Draft Bill, clause 55.

which arise from our review of the present law, and Part VI summarises the questions on which we seek the assistance of those who respond to this Paper.

B. The problems of the present law

1.22 We must give a few words of explanation and, perhaps, of warning, at the outset. The law of involuntary manslaughter is entirely a matter of common law, and it has to be pieced together from decided cases. Even more than most parts of the criminal law which suffer from that handicap, involuntary manslaughter has always been notorious for its uncertainty, and its lack of any clear conceptual vocabulary. That part of it which is now described as "unlawful act manslaughter" has been from time to time the object of complaint, not to say bewilderment, for over a century. The conceptual position has been made, if anything, worse by the efforts of courts in the last thirty years, to keep the law within something like decent bounds. These efforts have had to be undertaken on an ad hoc basis, without the support of a proper framework of policy and analysis, and tainted by the doctrine of constructive liability which underpins this part of the law.

1.23 The law of "gross negligence manslaughter" is in an even worse state. It appeared to have been revolutionised by the House of Lords as recently as 1983.[43] However, the position adopted by the House of Lords has now been largely abandoned by the Court of Appeal,[44] which has at the same time understandably pleaded for an urgent review of the law with a view to law reform.[45] Although the House of Lords is to have an opportunity to reconsider the law later this year,[46] we believe it would be advantageous to publish this Consultation Paper now in order to clarify the issues before that hearing takes place.

1.24 This unpromising background makes it inevitable that it is difficult to state the law with any certainty, let alone succinctness. It is also virtually impossible to identify any governing principles or policy which inform it. This, of course, is why the present study is so urgently needed. We have, however, felt obliged, because of the present parlous state of the law, to explain the position in some detail; and to draw, where appropriate, on illustrative material from other jurisdictions. That has led to a fairly lengthy review for which we make no apology. We would assure readers that the material set out in this Paper is the very minimum necessary if we are to give a full account of the deplorable state of the present law of involuntary manslaughter, and of the reasons which have led us to give priority to the present project.

[43] *Seymour* [1983] 2 AC 493.

[44] In *Prentice* [1993] 3 WLR 927.

[45] See para 1.18 above.

[46] On 23 November 1993 the House of Lords granted Dr Adomako, the one unsuccessful appellant in the case entitled *Prentice*, leave to appeal from the decision of the Court of Appeal. See *Adomako* (pet allo) [1994] 1 WLR 15, and para 3.154 below.

C. Manslaughter as part of the law of homicide

1.25 We mention here for the sake of completeness that manslaughter, being part of the law of homicide, is subject to rules which apply throughout that law. Of these, the most important are that the accused's conduct must have caused the death;[47] and, somewhat more controversially, the rule that the death must occur within a year and a day of the relevant acts or omissions of the accused.[48]

1.26 The latter rule has many critics. In a modern world, with modern medical technology, it may well lead to unexpected or unjust results. However, because it is a rule applying to the whole of the law of homicide, we do not consider that it would be appropriate to review it in the context of this consultation paper, which is concerned only with involuntary manslaughter. We are therefore considering a separate review of the year and a day rule and hope to consult on this subject in due course.

[47] See eg Smith & Hogan, *Criminal Law* (7th ed, 1992), pp 331-346.

[48] *Ibid*, pp 330-331.

PART II

UNLAWFUL ACT MANSLAUGHTER

A. Introduction

2.1 The basis of this type of manslaughter is that the defendant killed by or in the course of performing an unlawful act. Lord Parker CJ has described the law in these terms:

> A man is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offence.[1]

2.2 As we have already observed, until the enactment of the Homicide Act 1957, a defendant who killed in the course of committing a felony was guilty of murder. Since the passing of that Act such a defendant can be guilty only of manslaughter.[2] The alternative name for this form of manslaughter, "constructive manslaughter", draws attention to the fact that this species of manslaughter is based upon constructive liability. The law "constructs" culpability for manslaughter out of some lesser crime committed by the defendant which has accidentally caused death. Because of this feature of the offence, the accused's mental state is not assessed with reference to the death which he has accidentally caused, but only in relation to his unlawful act.

2.3 The basic principle underlying the concept of unlawful act manslaughter is undoubtedly simple, if harsh. However, a closer inspection of the case-law reveals a number of distinct but interlocking elements which have to be established in order to secure a conviction. The defendant must have caused the death of the deceased by an act which was both unlawful and objectively likely to result in some harm, albeit not serious harm.[3]

2.4 While each of these individual elements must be separately proved, they tend to overlap in practice. For example, courts have sometimes appeared to decide that an act was unlawful, although not constituting a crime in itself, on the ground that it was dangerous.[4] Because of these complications, the attempt to state the present law which follows is extensively cross-referenced. While we are explaining one element of the crime we have to refer to other elements of it which have not yet been described. A certain amount of patience is therefore required in reading this statement of the current law. It

[1] *Creamer* [1966] 1 QB 72, 82C-D.

[2] All distinctions between felonies and misdemeanours were, of course, abolished by s 1 of the Criminal Law Act 1967.

[3] *Church* [1966] 1 QB 59.

[4] See the discussion of *Cato* [1976] 1 WLR 110 (CA) at para 2.8 below.

might be appropriate in this context to reflect on the plight of the judges, lawyers and jury members who are called upon to apply it and those to whom it is applied.

B. An unlawful act

2.5 At one time it was thought that the commission of a tort was sufficient to ground a conviction of involuntary manslaughter if death resulted. In 1830, for example,[5] the defendant had thrown some stones down a mine. They broke some scaffolding which caused a wagon to overturn, killing the deceased. Tindal CJ directed the jury that the defendant's act in throwing the stones was a trespass, and as such was sufficient for manslaughter. However the dicta of some nineteenth century judges have been interpreted[6] as putting an end to this doctrine. For example, in 1883 Field J,[7] having expressed his great abhorrence of constructive crime, asserted that

> ... the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case...the civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter.[8]

2.6 A number of more recent cases also support the proposition that the mere commission of a tort is not sufficient. For example, in *Lamb*[9] the defendant did not have the required mens rea for a criminal assault or battery, and Sachs LJ held that it was therefore a misdirection for the judge to direct the jury that what he did was in law an "unlawful and dangerous act". He added:

> It is perhaps as well to mention that when using the phrase "unlawful in the criminal sense of the word" the court has in mind that it is long settled that it is not in point to consider whether an act is unlawful merely from the angle of civil liabilities.[10]

2.7 A further reduction of the scope of unlawful act manslaughter came in 1937 when the House of Lords held, in *Andrews v DPP*,[11] that negligent acts, even those which were capable of constituting statutory criminal offences, would not be sufficient to ground liability for manslaughter when death resulted. A van driver killed a pedestrian. Lord

[5] *Fenton* (1830) 1 Lewin 179; 168 ER 1004.

[6] Eg Smith & Hogan, *Criminal Law* (7th ed, 1992), pp 366-367.

[7] *Franklin* (1883) 15 Cox CC 163. The accused had killed the deceased by throwing into the sea an empty box which he had taken without its owner's permission and accidentally hitting a person bathing.

[8] (1883) 15 Cox CC 163, 165.

[9] [1967] 2 QB 981.

[10] [1967] 2 QB 981, 988D.

[11] [1937] AC 576.

Atkin insisted that it could not be assumed that conviction would necessarily follow because there had been careless or reckless driving contrary to the Road Traffic Acts:

> [The Road Traffic Acts] have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed no doubt to cases of negligent driving, which if death be caused would justify convictions for manslaughter, extend to degrees of negligence of less gravity...
>
> Sect[ion] 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter... .[12]

This case was widely interpreted to mean that negligent acts could not qualify as unlawful acts for this type of manslaughter:

> There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter.[13]

Andrews can thus be seen as a logical attempt to distinguish what is now called "unlawful act manslaughter" from the law of gross negligence manslaughter,[14] which provided (Lord Atkin cited *Bateman*[15] as authority) that in order to found criminal liability, negligence which was the cause of death must have been of a higher level of culpability than that required for civil liability. Since the essence of dangerous driving was negligence, a driver should only be convicted of manslaughter if his driving was so bad as to amount to gross negligence.[16]

[12] [1937] AC 576, 584.

[13] [1937] AC 576, 585.

[14] For which, see Part III below.

[15] (1925) 19 Cr App R 8 (CA).

[16] The restriction on negligent acts forming the basis of unlawful act manslaughter has also been adopted in Australia: see, for example, *Rau* [1972] Tas SR 59, 72 and *Howard's Criminal Law* (5th ed, 1990) p 124-125.

2.8 *Andrews* can therefore be seen as establishing that under modern law negligent criminal acts can*not* form the basis of unlawful act manslaughter. What is *positively required* as constituting the necessary unlawful act is less clear from the decided cases. For example, in *Cato*,[17] the defendant had caused the death of a friend by injecting him, at his request, with what in the event proved to be a fatal quantity of heroin solution. Lord Widgery CJ suggested, obiter, that Cato's act of injecting the deceased with heroin would have been capable of constituting an unlawful act, even if it could not constitute a criminal offence in itself. Although the supply of heroin to another is an offence under the Misuse of Drugs Act 1971, in this case the heroin was supplied by the deceased and the appellant merely administered it, which was not itself an offence. Lord Widgery CJ held that the act amounted to an offence contrary to section 23 of the Offences against the Person Act 1861,[18] but added, obiter,

> ...had it not been possible to rely on the charge under s 23 of the Offences against the Person Act 1861, we think there would have been an unlawful act here, and we think the unlawful act would be described as injecting the deceased Farmer with a mixture of heroin and water which at the time of the injection and for the purposes of the injection the accused had unlawfully taken into his possession.[19]

It can be seen that Lord Widgery CJ extended the undoubtedly criminal nature of the defendant's initial act of taking possession of the drug, in order to render the entire sequence of his actions unlawful. However, it was the injection itself which caused the death,[20] and it remained the case that the administration of the drug, although unlawful by extension, was not a crime in itself. If the obiter dictum of the Court of Appeal in this case represents the law, then it would appear that an "unlawful act" for manslaughter need not itself contain all the elements of a recognised criminal offence.

2.9 No light was shed on this issue by the leading House of Lords case in this area of the law.[21] The appellants, two 15 year old boys, had thrown a piece of paving stone from the parapet of a bridge as a train approached, and it had killed the guard. They were convicted of unlawful act manslaughter and their appeal to the Court of Appeal was

[17] [1976] 1 WLR 110 (CA).

[18] Which states:

> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable ... to be kept in penal servitude for any term not exceeding ten years.

[19] [1976] 1 WLR 110, 118G-H.

[20] The issues of causation raised by this case are discussed at para 2.34 below.

[21] *Newbury* [1977] AC 500.

dismissed.[22] They were permitted to appeal to the House of Lords on the following point of law: "can a defendant be properly convicted of manslaughter, when his mind is not affected by drink or drugs, if he did not foresee that his act might cause harm to another?" The House of Lords answered that question in the affirmative, dismissing the appeal. In view of a concession by counsel that the boys' act was unlawful, the basis on which it was unlawful was not in issue before either court.

2.10 The boys' act could have amounted to one of a number of different offences. For example, it could have constituted an offence contrary to the obscurely worded section 34 of the Offences against the Person Act 1861 ("the 1861 Act"),[23] which provides:

> Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor... .[24]

The elements required for this offence are unclear. It is possible that "unlawful" in this context simply means "without legal excuse or justification". If it does not, any reliance on this section in the context of unlawful act manslaughter would simply throw the question back one stage: what type of unlawful act is required for an offence contrary to section 34 of the 1861 Act? The required mental element is also unclear. The section stipulates that the "omission or neglect" which forms the basis of the offence must have been "wilful". "Wilful" in this context means that the omission or neglect was deliberate and intentional, not accidental or caused by inadvertence.[25] Although the word "wilful" does not qualify "unlawful act", it can perhaps be assumed by implication that the required mental element is that the act was done voluntarily and intentionally.

2.11 The appellants' act could also have amounted to an offence contrary to section 1(1) of the Criminal Damage Act 1971:

[22] [1976] 62 Cr App R 291.

[23] Our recommendations for the reform of this section are set out in Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, Appendix B, paras 10.5-11.1.

[24] Section 33 of the Act creates the more serious offence of "unlawfully and maliciously throw[ing], or caus[ing] to fall or strike, at, against, into or upon any engine [etc]...used upon any railway, any wood, stone or other matter or thing...", but requires a mental element of "with intent to injure or endanger the safety of any person being in or upon such engine [etc]..." which would probably have been difficult to prove.

[25] *Holroyd* (1841) 2 M & Rob 339, 174 ER 308, in which the judge directed the jury:

> ...that if they believed that the rubbish had been dropped on the rails by mere accident, the defendant had not committed an offence...but...it was by no means necessary...that the defendant should have thrown the rubbish on the rails expressly with a view to upset the train of carriages. If the defendant designedly placed there substances having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act...

> A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

Even if it could not have been proved that the appellants intended to damage the train or track, they would almost certainly have been reckless, in the *Caldwell*[26] sense, as to those results.

2.12 Although the ground of appeal concerned foresight of harm, it would still have been possible to prove the necessary mental element for common law assault (intention or subjective recklessness as to inflicting unlawful violence or as to causing the apprehension of the immediate infliction of unlawful violence).[27] Further, it might also have been possible to prove that the appellants had committed an offence under section 47 of the 1861 Act, occasioning actual bodily harm, which requires only the mens rea of common assault together with the causing of actual bodily harm; intention or foresight with regard to the specific harm caused is not necessary.[28] Their act also, incidentally, constituted the tort of trespass to property.

2.13 The fact that in *Newbury* the basis on which the initiating act was unlawful was not in issue meant that the House of Lords was deprived of the opportunity to identify with precision the type of unlawful act on which it is possible to found a charge of manslaughter. As has been seen, the act in question may have been one or more of a variety of criminal offences and also a tort. However, it was left unclear whether a complete criminal offence was required, or whether an act with some criminal elements would suffice. Even on the assumption that the unlawful act had to amount to a crime, it was left unclear whether an offence against property, such as criminal damage, was sufficient, or whether an offence of violence against the person would be required.[29]

2.14 The fact that the House of Lords was not obliged to stipulate the unlawful basis of the act also left in doubt the nature of the mental element required to render the act unlawful. As has been noted, the House dismissed the appeal, holding that the appellants' foresight of harm was not a prerequisite of unlawful act manslaughter. What was not made clear

[26] [1982] AC 341. The House of Lords held in this case that a person is reckless whether any property would be destroyed or damaged if (1) he does an act which in fact creates an obvious risk that property would be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nevertheless gone on to do it.

[27] See *Savage* [1992] 1 AC 719, 740; *Venna* [1976] QB 421, confirmed in *Spratt* [1991] 1 WLR 1073, and, obiter, in *Parmenter* [1992] 1 AC 719, 736.

[28] *Roberts* (1971) 56 Cr App R 95 (CA).

[29] Although the added requirement that the act should be objectively dangerous, see paras 2.21-2.25 below, provides some guidance on this point.

was whether foresight of harm was required in order to render the initiating act "unlawful" in the first place.

2.15 This point may be illustrated by reference to the alternative bases of the unlawful act which were suggested at paragraphs 2.10-2.12 above. If an offence contrary to section 34 of the 1861 Act was sufficient, in order to be guilty of that offence, the appellants probably need only have intended to throw the stone over the parapet: they need not have had foresight or intention regarding the harm caused. Lord Salmon referred to this type of mental state when he said:

> ...in manslaughter there must always be a guilty mind. This is true of every crime except those of absolute liability. The guilty mind usually depends on the intention of the accused. Some crimes require what is sometimes called a specific intention, for example murder, which is killing with intent to inflict grievous bodily harm. Other crimes need only what is called a basic intention, which is an intention to do the acts which constitute the crime. Manslaughter is such a crime: see *Larkin* 29 Cr App R 18 and *Church* [1966] 1 QB 59.[30]

However, the cases of *Larkin* and *Church* to which Lord Salmon referred were principally concerned with another element of unlawful act manslaughter, considered at paragraphs 2.21-2.25 below, namely that the act in question must not only have been unlawful, but also objectively dangerous. In *Church* the Court of Appeal held in this context that the defendant himself need not have realised that his act was likely to cause some harm, as long as an objective observer would have been so aware. In the extract quoted above, and elsewhere in his judgment, Lord Salmon did not distinguish between these two elements of manslaughter. If he had done so it would have been apparent to him that, since offences of negligence were removed from the category of unlawful acts by *Andrews*,[31] to qualify as an unlawful act (on the assumption that the unlawful act need be a complete criminal offence) the defendant must have had some form of subjective mens rea. Although *Church* is authority for the proposition that the defendant need not himself have recognised his act to be dangerous, the requirement that he must have had a mental state capable of rendering the act criminal, and not merely negligent, remained. If the basis of the unlawful act was indeed section 34 of the 1861 Act, the only mens rea required would have been the intention to throw the stone. If, however, an assault had been relied upon as the unlawful basis of the act, it would, presumably, have been necessary to prove subjective recklessness or intention to harm or frighten.

2.16 Because Lord Salmon's speech necessarily focused on the objective nature of the element of dangerousness, a concept originally introduced in order to restrict the ambit of

[30] [1977] AC 500, 509B-C.

[31] [1937] AC 576 (HL), and see paras 2.7-2.8 above.

unlawful act manslaughter,[32] it gave rise to the implication that no mental fault need be proved in relation to the unlawful act save the intention to do the act in question. Such an implication would considerably widen the field of potential liability for manslaughter. The relevant question could, perhaps, be put in another way: to found a charge of manslaughter, does the unlawful act have to be a criminal offence, complete in all its elements, including mens rea?

2.17 This question had appeared to have been settled by the earlier case of *Lamb*.[33] The defendant had fired a gun at close range at his friend, and had killed him. However, he had aimed the gun and pulled the trigger only as a joke, and had believed, on what experts agreed were reasonable grounds, that it was physically impossible for the gun to go off. The trial judge had given the jury a direction based on *Church*, stressing the requirement that the unlawful act had to be objectively dangerous.[34] Sachs LJ, giving the judgment of the Court of Appeal, observed of the trial judge:

> Unfortunately, however, he fell into error as to the meaning of the word "unlawful" [in the passage from *Church*]...The trial judge took the view that the pointing of the revolver and the pulling of the trigger was something which could of itself be unlawful even if there was no attempt to alarm or intent to injure... . It was no doubt on that basis that he had before commencing his summing-up stated that he was not going to "involve the jury in any consideration of the niceties of the question whether or not the" action of the "accused did constitute or did not constitute an assault"... .[35]

He went on to hold that

> ...mens rea, being now an essential ingredient in manslaughter (compare *Andrews* and *Church*) that could not in the present case be established in relation to [unlawful act manslaughter] except by proving that element of intent without which there can be no assault.[36]

2.18 In *Newbury* Lord Salmon disapproved a passage from *Gray v Barr*[37] in which Lord Denning MR had cited *Lamb* as authority for the proposition that

> In manslaughter of every kind there must be a guilty mind... . In the category of manslaughter relating to an unlawful act, the accused must do a

[32] See paras 2.21-2.22 below.

[33] [1967] 2 QB 981.

[34] See paras 2.21-2.25 below.

[35] [1967] 2 QB 981, 987E-G.

[36] [1967] 2 QB 981, 988C.

[37] [1971] 2 QB 554, (CA).

dangerous act with the *intention* of frightening or harming someone, or with the *realisation* that it is likely to frighten or harm someone... .[38]

However, he did not disapprove *Lamb* itself, but only the propositions Lord Denning derived from it. *Lamb* is therefore still arguably authority for the proposition that the unlawful act must be capable of constituting a complete criminal offence. However, Sachs LJ nowhere said in terms that the act had to be a crime. Instead he used the phrase "unlawful in the criminal sense of the word".[39] There is therefore no clear authority in English law equivalent to, for example, the New Zealand case of *Myatt*,[40] which confirmed that in order to found a charge of manslaughter the initiating unlawful act must itself be a specific criminal offence.

2.19 The subsequent cases of *O'Driscoll*,[41] *Ball*[42] and *Jennings*[43] would also appear to support the proposition that the act must have been performed with a mental element recognised by the law to render it criminal. So, for example, in *O' Driscoll* it was held that where the relevant unlawful act required proof of specific intent, the accused's intoxication could be relied upon to show that he lacked that specific intent. In *Ball* it was held that the defendant's state of mind was relevant to establish first, that the act was committed intentionally, and secondly, that it was an unlawful act. Similarly, in *Jennings*, where the accused drew out a knife with which he then unintentionally killed the deceased, the Court of Appeal held that the knife was not an offensive weapon *per se* within the meaning of section 1 of the Prevention of Crimes Act 1953, and so the intention of the accused was relevant to the question whether his drawing the knife was an unlawful act. More recently in *Scarlett*[44] the Court of Appeal held that, where the unlawful act relied upon was assault through use of excessive force, the defendant's mistaken belief that the force used was reasonable in the circumstances is sufficient to exculpate him.

2.20 It can therefore, perhaps, be assumed that, despite the problems created, for different reasons, by the cases of *Cato* and *Newbury*, the unlawful act committed by the defendant must have been capable of constituting a criminal offence in itself, in order for the act to form the basis of a charge of manslaughter. These two cases show how the two different requirements that the act must be both (a) unlawful and (b) objectively dangerous can become confused, thereby potentially seriously widening the ambit of the offence.

[38] *Lamb* [1967] 2 QB 981; *Gray v Barr* [1971] 2 QB 554, 568B-C cited in *Newbury* AC 500, 507E-F.

[39] [1967] 2 QB 981, 988D.

[40] [1991] 1 NZLR 674.

[41] (1977) 65 Cr App R 50.

[42] [1989] Crim LR 730.

[43] [1990] Crim LR 588.

[44] [1993] 4 All ER 629.

C. Dangerousness

2.21 The requirement that the unlawful act must be one which was recognisably dangerous, has been noted above. This is a relatively recent limitation on unlawful act manslaughter, articulated clearly in those terms by the Court of Appeal in *Larkin*[45] and followed by the courts ever since. In *Larkin* the defendant was brandishing a razor to frighten a man who was in the company of the deceased woman, when the deceased, who was under the influence of drink, fell against the razor, cut her throat and died. The court held that the defendant's attempt to frighten the man was an unlawful act, and formulated the requirements of unlawful act manslaughter in these terms:

> ...where the act which a person is engaged in performing is unlawful, then, if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter.[46]

The *Larkin* formulation was unsatisfactory as a complete formulation of the offence in that the court not only did not specify who must have been endangered but also did not explain whether the test for "danger" was objective or subjective.

2.22 However, in 1966 the Court of Appeal clarified the matter in the case of *Church,*[47] in which Edmund Davies J said that:

> ...an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.[48]

As we have noted above, Lord Salmon subsequently approved the *Church* test in his speech in *Newbury*:[49]

> ...the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger.[50]

[45] [1943] 1 All ER 217.

[46] [1943] 1 All ER 217, 219D-E.

[47] [1966] 1 QB 59.

[48] [1966] 1 QB 59, 70B-C.

[49] [1977] AC 500.

[50] [1977] AC 500, 507D.

2.23 In later cases the Court of Appeal explained both the type of harm which should have been foreseen, and the knowledge and attributes which could be ascribed to the reasonable person, if the test of dangerousness was to be satisfied. In *Dawson*,[51] a petrol station attendant with a weak heart had died of heart failure, and expert evidence suggested that this had been brought on by shock, following the appellants' attempted robbery of the petrol station. On the question whether emotional shock could amount to "harm" for manslaughter, Watkins LJ in the Court of Appeal was prepared to

> ...assume without deciding the point, although we incline to favour the proposition, that harm in the context of manslaughter includes injury to the person through the operation of shock emanating from fright... .[52]

However, he added that in his opinion emotional disturbance alone would not suffice.[53] With regard to the knowledge which could properly be attributed to "all sober and reasonable people", he said:

> This test can only be undertaken upon the basis of the knowledge gained by a sober and reasonable man as though he were present at the scene of and watched the unlawful act being performed and who knows that, as in the present case, an unloaded replica gun was in use, but that the victim may have thought it was a loaded gun in working order. In other words, he has the same knowledge as the man attempting to rob and no more. It was never suggested that any of these appellants knew that their victim had a bad heart... .[54]

2.24 The "reasonable observer" must thus have attributed to him any knowledge which would have been available to the defendant. For example, in *Watson*,[55] the burglary of a house in which the deceased, a frail 87 year old man, resided became "dangerous" as soon as his frailty would have been apparent to a reasonable observer. The Court of Appeal held that the whole of the burglarious intrusion comprised the "unlawful act" and that it did not come to an end when the appellant's foot crossed the threshold or windowsill of the house. It concluded that the appellant must have become aware of the victim's frailty and approximate age during the course of that act.

2.25 However, despite the fact that the knowledge of the defendant is attributed to him, the reasonable observer will not be attributed with any *mistaken* belief on his part, and in that

[51] (1985) 81 Cr App R 150.

[52] (1985) 81 Cr App R 150, 156.

[53] (1985) 81 Cr App R 150, 156-157.

[54] (1985) 81 Cr App R 150, 157.

[55] [1989] 1 WLR 684.

sense the test is certainly an objective one. This was established by the case of *Ball*.[56] The defendant had loaded his gun from a mixture of live and blank ammunition held in his pocket, and fired at the victim thinking his gun contained blanks. Such an act was unquestionably dangerous, when looked at objectively. The defendant's mistaken view that he was taking no risk was irrelevant, since a reasonable observer would have concluded that it was dangerous to fire a gun loaded from a source which contained both live and blank ammunition.

2.26 In Australia the requirement that the act should be "dangerous" in this context has been held in some cases to mean "likely to cause serious injury".[57] This is a much more restrictive test than that provided by English law, which requires the risk of some harm, but not of serious harm.[58] In *Holzer*[59] Smith J said:

> ...the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury.[60]

The editor of *Howard's Criminal Law*[61] has correctly pointed out that if this could be assumed to represent a correct statement of Australian law, the doctrine of *unlawful act* manslaughter would be rendered superfluous in Australia, since it would be difficult to imagine a case which met this requirement in which a defendant could not properly be charged with gross negligence manslaughter.[62]

D. The nature of the required causal link

2.27 We have pointed out that the requirement that the act should be "dangerous" seems to have been introduced to limit the range of unlawful act manslaughter. Another way in which judges have attempted to restrict the operation of this head of manslaughter is through distinctive applications of the rules of causation. The origins of a causal test stricter than the test which is normally applied in the criminal law can be seen in a number of nineteenth century cases in which the courts appeared to take a wide view of

[56] [1989] Crim LR 730.

[57] *Wills* [1983] 2 VR 201.

[58] See para 2.22 above.

[59] [1968] VR 481, a decision of the Victorian Supreme Court, which was approved by the Victorian Court of Appeal in *Wills* [1983] 2 VR 201.

[60] [1968] VR 481, 482.

[61] (5th ed, 1990) p 130.

[62] Other dicta of the Supreme Court of Victoria go even further. For example, Sholl J in *Longley* [1962] VR 137, 142, suggested that the test should be "realised by [the defendant] as dangerous". If such a test were adopted the role of unlawful act manslaughter would certainly disappear, since such a defendant could undoubtedly properly be charged with either reckless or criminally negligent manslaughter.

what would constitute a *novus actus interveniens* sufficient to break the chain of causation. In *Bennett*[63] the defendant manufactured fireworks contrary to statute, and kept a stock of "red fire" in his house for this purpose. A fire broke out, either by accident or through the negligence of his servants, and it ignited a rocket which then set fire to the house opposite, killing the deceased. It was held that the defendant's act in unlawfully keeping fireworks was not a sufficient ground of guilt because that act had only caused the death through the superaddition of a third person's negligence:

> The keeping of the fireworks may be a nuisance, and if from that unlawful proceeding the death had ensued as a necessary and immediate consequence, the conviction might be upheld. But the keeping of the fireworks did not alone cause the death... .[64]

2.28 This approach deviated from the ordinary rule of causation which is to the effect that a negligent act by a third party does not break the chain of causation unless it was grossly abnormal or unexpected.[65] A similar approach underlay the case of *Martin*,[66] although in this case, too, the court did not expressly say that it was applying an unusually strict test of causation. The defendant offered gin to a four year old child. When the glass was raised to the child's lips, he twisted it from the defendant's hand and swallowed the entire contents, dying shortly afterwards. Vaughan B summed up for acquittal because the drinking of gin in this quantity was, he decided, the act of the child, in spite of the normal rule that the act of a young child did not negative causation.[67]

2.29 *Bennett* might be explained on the basis that there was not a sufficient connection between the actual licensing offence and the death. Similarly, although the court in *Martin* did not identify the offence on which the prosecution relied, and indeed did not specifically say that the prosecution case was based on unlawful act manslaughter at all, that case might also be explained on the grounds that there was an insufficient connection between the offering of alcohol to an under age child (assuming that such an action was then unlawful) and the death.

2.30 There is a series of cases which appear to develop this principle that there should be a link between what might be called the specifically criminal element in the defendant's conduct and the death in question. Hale gives an early example of this approach:

> By the statute of *33 H8 cap 6* "No person not having lands *&c* of the yearly value of one hundred pounds *per annum* may keep or shoot in a gun upon

[63] (1858) 8 Cox CC 74.

[64] (1858) 8 Cox CC 74, 76 per Cockburn CJ.

[65] Hart and Honore, *Causation in the Law* (2nd ed, 1985), p 335.

[66] (1827) 3 Car & P 211; 172 ER 390.

[67] Hart and Honore, *op cit*, p 336.

> pain of forfeiture of ten pounds." Suppose therefore such a person not qualified shoots with a gun at a bird, or at crowes, and by mischance it kills a by-stander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him, for tho the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not inhanse the effect beyond its nature.[68]

The defendant would have been just as likely to kill if his income had exceeded £100. For this reason the criminal element in the unlawful act, the illegal use of the gun, could not be said to have resulted in death. It could not be said that "but for" the fact that the defendant was earning less than £100 the death would not have occurred, so that the criminal element in the defendant's act could not be said to have caused the death.

2.31 Similar reasoning might also underlie a series of nineteenth century cases which were concerned with acts made unlawful by statute. In *Van Butchell*,[69] for instance, Hullock B held that the fact that the accused was liable to a statutory penalty for practising medicine whilst not licensed to do so was irrelevant to a charge of manslaughter, provided that he had taken reasonable care in the operation. The causal point was not directly stated, but it seems probable that the question whether the accused was licensed was regarded as irrelevant to the cause of death at a period when, as Hullock B put it, "in remote parts of the country, many persons would be left to die if irregular surgeons were not allowed to practise".[70]

2.32 Causal reasoning of a similar kind might also provide an explanation of the case of *Franklin*.[71] It could be argued that the commission of an unlawful act before the box was thrown into the sea was not sufficiently related to the death of the swimmer to meet the requirement that the death was in "the course of" the unlawful act. The trespass against the stall holder was committed when the accused touched the box: it was not the trespass which killed the bather.

2.33 However, although these early authorities appear to support a principle that there should be a connection between the criminal element in the defendant's act and the death, such a principle was never expressly articulated. This was, perhaps, a pity, since the logical effect of the application of such a principle would be a requirement that the defendant's act must have constituted an assault against the deceased. Because the mental element for common law assault is an intention to cause the victim to apprehend immediate and

[68] 1 PC 475-476.

[69] (1829) 3 Car & P 629; 172 ER 576.

[70] (1829) 3 Car & P 629, 633; 172 ER 576, 578.

[71] See para 2.5 above, for another interpretation of this case.

unlawful violence, or subjective recklessness as to whether such apprehension is caused,[72] this rule would have introduced a degree of subjectivity into a ground of manslaughter which has been criticised very frequently for imposing serious criminal liability for a chance result, whose gravity bears no relation at all to the defendant's culpability.[73] However, nineteenth century judges were unwilling to allow the rules on causation to go so far,[74] and more recent case-law casts doubt on the existence of any such principle operating in unlawful act manslaughter.

2.34 For example, we have noted above that in *Cato*[75] Lord Widgery CJ would have been willing to extend the defendant's initial criminal act of taking unlawful possession of heroin, in order to render "unlawful" his action which followed (injecting his friend with the drug), even if that act was not in itself criminal. However, it was the injection itself which caused the death, and this analysis is an extreme example of constructive liability in a conviction for manslaughter, since the deceased's death would have been caused by the injection of heroin even if the defendant had been in lawful possession of it.[76]

2.35 We have also seen how in *Newbury*[77] the House of Lords did not feel itself obliged to identify the basis of the unlawfulness of the act relied upon. This omission lends support to the proposition that it is not a requirement that the death should arise from the specifically criminal nature of the act. As we have observed, in that case the unlawful act could have been one of a variety of criminal offences involving either damage to property or injury to people, and the House of Lords regarded it as unnecessary to identify the offence in question.

2.36 In the same way the Court of Appeal in *Watson,*[78] by its failure to deal with the point, cast doubt on the existence of any requirement that there should be such a causal link. The appellant had caused the death of an old man with a serious heart condition when he entered his house, woke him up and abused him verbally. He pleaded guilty to burglary

[72] See *Savage* [1992] 1 AC 719, 740; *Venna* [1976] QB 421, confirmed in *Spratt* [1991] 1 WLR 1073, and obiter in *Parmenter* [1992] 1 AC 719, 736.

[73] See paras 2.52-2.55 below.

[74] The major problem was probably the need to reconcile the law on unlawful act manslaughter with the felony-murder rule which applied until 1957, and which did not require any subjective intention to harm on the part of the accused.

[75] [1976] 1 WLR 110.

[76] For the sake of this argument it is necessary to imagine a factual situation whereby the accused was lawfully in possession of a drug listed in the Misuse of Drugs Regulations 1985 Schedules 2 or 3 (which do not include heroin). For example, r 10(2) permits possession of any such drug for administration for medical purposes in accordance with the directions of a practitioner. It would be a question of fact whether a defendant who injected the drug into his friend was lawfully in possession of it in accordance with the regulation: as in *Dunbar* [1981] 1 WLR 1536, in which that principle was applied to a doctor who administered a controlled drug to himself.

[77] [1977] AC 500; see paras 2.9-2.16 above.

[78] [1989] 1 WLR 684.

and was also convicted of manslaughter, on the basis that the burglary was an unlawful and dangerous act which caused the old man's death. In his discussion of the knowledge which could be attributed to the reasonable observer for the purposes of the *Church* test,[79] Lord Lane CJ held that the unlawful act comprised the whole of the burglarious intrusion. However, under section 9(1)(b) of the Theft Act 1968, an entry as a trespasser only amounts to the offence of burglary if it is effected with intent to steal, inflict grievous bodily harm, rape or do unlawful damage to the building or anything therein. It was thus only the appellant's *intention* that made the intrusion criminal. The old man would have suffered equally from fright had the appellant entered with a non-criminal intent.

2.37 In Australia it is probably the law that a causal restriction applies which is along the lines of that outlined at paragraph 2.29-2.33 above. The editor of *Howard's Criminal Law*[80] cites a number of examples:

> It is dangerous to drive a car negligently in a crowded street even though one's degree of negligence exceeds only the standard applied in the law of torts. If one is unlicensed or uninsured at the time the driving is also unlawful, but the unlawful and dangerous act doctrine would not be applied to a case of this kind. If a highly qualified surgeon were removed from the roll of medical practitioners for sexual misbehaviour with a patient, and subsequently operated on a friend to remove a diseased appendix, a dangerous act, it would not be conclusive against him that his operating was unlawful because he was disqualified from practising.[81] If a chemist killed a customer by misreading a prescription and dispensing a dangerous drug, he would not become guilty of manslaughter by reason only of the fact that he failed to keep a record of dangerous drugs dispensed by him in breach of his statutory duty to keep such a record.[82]

Although these acts would qualify as both unlawful and dangerous, in practice such cases would be tried on the basis of criminal negligence.[83]

2.38 The editor suggests that there are grounds in Australian law for the extension of this principle of a causal connection between the unlawfulness of the act and the death:

[79] See para 2.24 above.

[80] (5th ed, 1990) p 126.

[81] *Gunter* (1921) SR (NSW) 282, 287 (footnote in original).

[82] For example, Poisons Act 1966 (NSW) s 11; Poisons Act 1962 (Vic) s 14(1) (footnote in original).

[83] *Howard's Criminal Law* (5th ed, 1990) p 126.

"What the courts appear to have in mind is not an act which is dangerous and incidentally also unlawful, but an act which is unlawful *because* it is dangerous".[84]

E. The requirement that the act must have been "directed at" the deceased

2.39 In *Dalby*[85] the Court of Appeal again tried to impose restrictions on the ambit of unlawful act manslaughter. The defendant had supplied some tablets of a controlled drug to the deceased who injected the drug intravenously and died as a result. The court found that there had been several reported cases of manslaughter where the conduct of the victim had not been a direct act, but these had all been cases of manslaughter by negligence: the researches of counsel had failed to find any case where the act was not a direct act in all the reported cases of manslaughter by an unlawful and dangerous act. Accordingly, although the defendant had undoubtedly committed an offence (of supplying a controlled drug) under the Misuse of Drugs Act 1971, the Court of Appeal quashed his conviction of manslaughter on the ground that

> ...where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury, however slight.[86]

2.40 In *Pagett*,[87] decided the following year, the appellant had fired at police officers, using the deceased woman as a shield, and when the officers fired back, one of them inadvertently killed the deceased. This case provided the Court of Appeal with an opportunity to confirm the rule in *Dalby*, since the deceased was killed, not by any act of the appellant directed at her, but by police gunmen responding to his shots. However, the court did not refer to *Dalby*, or to the test set out in express terms in that case that the defendant's acts should be "directed at" the deceased. Instead, the judgment was based on general principles of causation.[88]

2.41 A fortnight later, in *Mitchell*,[89] a differently composed division of the Court of Appeal expressly followed *Pagett* and rejected an argument based on *Dalby*. In the course of trying to force his way into a post office queue, the appellant had assaulted a 72 year old man, thereby causing him to fall against an 89 year old woman who fell to the ground

[84] (5th ed, 1990) p 127 (emphasis in original). This view was adopted in *Martin* (1983) 32 SASR 419, 451-452.

[85] [1982] 1 WLR 425.

[86] [1982] 1 WLR 425, 429C.

[87] (1983) 76 Cr App R 279.

[88] The court held that the officers fired in response to the appellant's unlawful and dangerous act of firing at them, and that the officers' acts were acts of reasonable self-defence and as such were involuntary acts, caused by the act of the appellant. As a result, the officers' acts could not break the chain of causation so as to relieve the appellant of criminal responsibility for the deceased's death. The court rejected argument based on cases decided in the United States, and did not have any English authority, such as *Dalby*, drawn to its attention.

[89] [1983] QB 741.

and sustained fatal injuries. In rejecting an argument that in order to establish manslaughter the unlawful and dangerous act had to be directed at the person whose death was caused, Staughton J held that a principle analogous to the doctrine of transferred intention in murder could operate in unlawful act manslaughter,[90] in other words, that the act need not have been "directed at" the victim in the sense that the appellant intended to harm or risk harm specifically to that individual. Instead, he appeared to support a modified form of the *Dalby* test, that the harm must only be a "direct result" of the appellant's act:

> We can well understand...why the Court held that there no sufficient link between Dalby's wrongful act (supplying the drug) and his friend's death... . Here, however, the facts were very different. Although there was no direct contact between [the appellant and the victim], she was injured as a direct and immediate result of his act... . The only question was one of causation: whether her death was caused by [the appellant's] act.[91]

He added that this conclusion was now supported by the decision of the Court of Appeal in *Pagett*.

2.42 In *Goodfellow,*[92] too, the Court of Appeal explicitly rejected an argument based on *Dalby*. The appellant wished to move from his council house and set it on fire, killing his wife and child accidentally in the process. He appealed against his conviction for manslaughter on the ground that his actions were not "directed at" the victims, citing *Dalby* as authority. Lord Lane CJ said that the court believed that in *Dalby* Waller LJ was intending to say no more than that "there must be no fresh intervening cause between the act and the death".[93] It would appear to be settled, therefore, that *Dalby* did not establish any new limitation on the scope of unlawful act manslaughter, and that the ordinary rules of criminal causation should be applied.[94]

F. *R v Scarlett*

2.43 The recent case of *Scarlett*[95] has brought into vivid relief some of the problems which are inherent in the concept of unlawful act manslaughter. The appellant was the licensee

[90] [1983] QB 741, 748A-C.

[91] [1983] QB 741, 748F-G.

[92] (1986) 83 Cr App R 23.

[93] (1986) 83 Cr App R 23, 27.

[94] The observations of the Court of Appeal in *Ball* [1989] Crim LR 730, para 2.25 above, are less clear on this point. The court referred both to a test based on *Dalby*, that "[h]is act in firing at G was 'an act directed at the victim'", and to a test based on the conflicting authority of *Goodfellow*, that there was "no fresh intervening cause between the act and the death". However, these remarks were obiter, and no clear conclusion can be drawn from them as to the present state of the law.

[95] [1993] 4 All ER 629.

of a public house. The deceased, a heavily built man, entered the pub the worse for drink ten minutes after closing time, and the appellant asked him to leave. When he refused, the appellant pinned his arms to his sides from behind and bundled him towards the door into a lobby. Once inside the lobby the deceased fell backwards down a flight of stairs, and received fatal injuries to his head in his fall. The case against the appellant, who was charged with manslaughter, was that he had used excessive force in removing the deceased from his premises and in doing so had committed an unlawful act; because he had imparted such a momentum to the deceased the deceased's fall was a consequence of the unlawful act and the appellant was therefore guilty of manslaughter. When summing up the judge told the jury that the case boiled down to one fairly short question which they would have to ask themselves:

> Am I sure that [the appellant] used unnecessary and unreasonable and therefore unlawful force in ejecting [the deceased] from his public house and did that force - unlawful force - actually cause his fall?[96]

2.44 He then gave the jury a correct direction on the law of unlawful act manslaughter based on *Newbury*, namely that it was manslaughter if

> ...the killing is the result of the accused man's unlawful act, like an assault, which all reasonable people would inevitably realise must subject the victim to some form of harm, even if it is not serious... .[97]

However, while he was concentrating the attention of the jury on the objective dangerousness test established in the law of unlawful act manslaughter by the cases of *Newbury* and *Church*, he failed to give them a proper direction on the mental element required for a finding of assault by use of excessive force, thereby overlooking what had been decided in the case of *Gladstone Williams*.[98] In the passage quoted above he gave the jury the impression that the test of excessive force was, like the test of dangerousness in manslaughter, objective. However, in *Gladstone Williams* the Court of Appeal said that

> [In those circumstances where force may be applied to another lawfully] the defendant will be guilty if the jury are sure that first of all he applied force to the person of another, and secondly that he had the necessary mental element to constitute guilt. The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the

[96] [1993] 4 All ER 629, 633G.

[97] [1993] 4 All ER 629, 634E.

[98] [1987] 3 All ER 411 (CA), approved by the Privy Council in *Beckford* [1988] AC 130.

mental element can be substantiated by simply showing an intent to apply force and no more.[99]

In that case it was held that if a defendant mistakenly believed that he was justified in using force, he was entitled to be acquitted, even if his belief was unreasonable.

2.45 Mr Scarlett was convicted and appealed. In the Court of Appeal Beldam LJ referred to the principle laid down in *Gladstone Williams* and continued:

> Where, as in the present case, an accused is justified in using some force and can only be guilty of an assault if the force used is excessive, the jury ought to be directed that he cannot be guilty of an assault unless the prosecution prove that he acted with the mental element necessary to constitute his action an assault, that is: "...that the defendant intentionally or recklessly applied force to the person of another", per James LJ in *R v Venna* [1976] QB 421.
>
> Further, they should be directed that the accused is not to be found guilty merely because he intentionally or recklessly used force which they consider to have been excessive.
>
> They ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he was not to be convicted even if his belief was unreasonable.[100]

The court found that the conviction was unsafe and unsatisfactory because the directions to the jury regarding the appellant's use of force were inadequate.

2.46 It appears that the main cause of the difficulties which arose in *Scarlett* was that the trial judge did not properly explain to the jury the law concerning the reasonable use of force. However, it is probable that this error was compounded by two problems which are inherent in unlawful act manslaughter. The first of these is that the law requires a two-stage direction. The first part of the direction should relate to the unlawfulness of the initiating act, and the second part to the question whether that act was objectively dangerous. It is possible that the judge was led to confuse the test of dangerousness, which is objective in nature, with the test which identifies the mental element required to make the act an assault, and therefore unlawful, and this is, of course, a subjective test.

[99] [1987] 3 All ER 411, 413-414 per Lord Lane CJ, cited by Beldam LJ in *Scarlett* [1993] 4 All ER 629, 635J-636A.

[100] [1993] 4 All ER 629, 636E-G.

2.47 The second, and more important, problem inherent in unlawful act manslaughter which makes it difficult to apply the law properly, (which is also illustrated by the case of *Scarlett)*, is the fact that before the issue can arise the defendant's act must necessarily have resulted in a death. This fact discourages the cool appraisal of fault. As Beldam LJ put it:

> Because of the dire consequences of the deceased's fall, there was a real risk that the jury might be persuaded not only that the force applied was excessive but that the appellant's actions were likely to cause injury. It is important to emphasise that the question whether the action of the appellant was unlawful and the question whether it was dangerous have to be considered separately...[101]

Any homicide is likely to engender an emotive response in a jury. It is therefore all the more important in such cases that the required mental element and any legal formulation which has to be used in assessing fault should be as clear and simple as possible. The law of unlawful act manslaughter, as *Scarlett* so clearly illustrated, does not begin to meet these criteria.

G. The position in other common law jurisdictions

2.48 When we examine the law of other common law jurisdictions, we find that in most of them an offence similar to unlawful act manslaughter still forms part of their law. For example, section 205(5)(a) of the Canadian Criminal Code 1986 provides that a person commits culpable homicide when he causes the death of a human being by means of an unlawful act,[102] and the New Zealand Crimes Act 1961 has similar provisions,[103] as does the Tasmanian Criminal Code Act 1924.[104] There are, however, no equivalent provisions in the Codes of Queensland and Western Australia.[105] The position in the common law states in Australia is broadly the same as in England.[106] In the United States the Model Penal Code (1962)[107] rejected misdemeanour-manslaughter, as unlawful act manslaughter is commonly known there, and although a number of states retain the old common law rules, most modern codifications and proposals have followed

[101] [1993] 4 All ER 629, 637B-C.

[102] Any culpable homicide which is not murder or infanticide is manslaughter: Canadian Criminal Code 1986 s 217.

[103] New Zealand Crimes Act, 1961, ss 160(2)(a) and 171.

[104] Tasmanian Criminal Code Act 1924, ss 156(2)(c), 159(1).

[105] The editor of *Howard's Criminal Law* (5th ed, 1990) points out, however, at p 124 n 98, that some cases which would only amount to manslaughter at common law would amount to murder under s 279(2) of the Western Australian Code and s 302(2) of the Queensland Code because death was caused "by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life".

[106] See *Turner* [1962] VR 30, 34.

[107] Model Penal Code (1962) para 210.3.

the Code in this respect.[108] There is no offence equivalent to unlawful act manslaughter in the Indian Penal Code 1860.

2.49 The criminal law of the countries which have still retained unlawful act manslaughter was originally derived from the English common law in the nineteenth century , and many of them contain provisions which are now considered to be inappropriate in English law. For example, most of these jurisdictions retain some version of felony murder,[109] which was expunged from English law nearly forty years ago.[110]

2.50 Challenges have indeed been made in many of these jurisdictions to the validity of unlawful act manslaughter. It has been seen[111] that two judges[112] in the Supreme Court of Victoria have interpreted the requirement of dangerousness so strictly as to render unlawful act manslaughter almost indistinguishable from criminally negligent homicide. The editor of *Howard's Criminal Law*[113] concludes:

> The approaches of Sholl and Smith JJ would have the advantage of introducing an overdue simplification into the law of involuntary manslaughter by reducing it to two reasonably clearly defined categories: intentional harm and criminal negligence... . The doctrine of killing by unlawful act has undergone the process of being first reduced from murder to manslaughter and then progressively restricted by the development of criminal negligence and the introduction of the requirement that the act be dangerous. It is entirely in line with the history of the common law that as a prelude to its replacement by criminal negligence this particular doctrine should now be further limited by the requirement that D or a reasonable man in his position must have appreciated the likelihood of danger.

[108] See *American Law Institute Model Penal Code and Commentaries* (1980) Part II para 210.3 p 77.

[109] For example, in South Australia a killing during the commission of a felony other than abortion or attempted abortion by an act involving violence or danger to another person is murder: *Ryan* (1967) 121 CLR 205, 230; *Grapsas* [1973] VR 857; *Van Beelen* (1973) 4 SASR 353. In Victoria the Crimes Act s 3A states that an unintentional killing by an act of violence done in the course or furtherance of a crime the necessary elements of which include violence and which is punishable by imprisonment of ten years or more is murder. The New Zealand Crimes Act 1961 has a similar provision at s 168. The Canadian Criminal Code 1986 s 214 states, inter alia, that it is murder when a killing took place while the offender was committing or attempting to commit one of a number of listed offences, although this section was recently significantly limited by the Supreme Court in *Martineau* [1990] 2 SCR 633.

[110] Homicide Act 1957 s 1(1).

[111] See para 2.26 above.

[112] Smith J and Sholl J.

[113] (5th ed, 1990).

It is, however, too early to say whether either of these understandings of the unlawful and dangerous act doctrine will be accepted by the courts generally in the near future... .[114]

2.51 We have already noted how the Model Penal Code in the United States rejected the doctrine of "misdemeanour-manslaughter" in 1962, and in New Zealand the report of the Crimes Consultative Committee recommended in 1991[115] that the law of manslaughter should be reformed to include only death resulting from the intentional or reckless infliction of serious personal harm on another person. Similarly, in its 1987 report the Law Reform Commission of Canada[116] recommended that only negligently or recklessly causing death should constitute manslaughter, by implication abolishing unlawful act manslaughter.

H. Proposals for reform

2.52 Because the offence of unlawful act manslaughter is founded on principles of constructive liability, it is unattractive in principle and has frequently been criticised. In particular, we have already noted the strongly worded recommendation of the Criminal Law Revision Committee in 1980. That committee divided the subject into three categories: (i) doing an act intending to cause injury (though not serious injury) or being reckless whether injury (though not serious injury) is caused, and actually causing death; (ii) causing death by an act of gross negligence; and (iii) causing death by an unlawful act in some circumstances falling outside the previous categories. For ease of access, we will repeat here the Committee's view on the first of these categories:

> The injury intended or foreseen may be quite slight. Suppose that A strikes B and gives him a bleeding nose; B, unknown to A, is a haemophiliac and bleeds to death. Or, A strikes B who falls and unluckily hits his head against a sharp projection and dies. Or, A chases B with the object of chastising him; B runs away, trips and falls into a river in which he drowns. In each of these cases, although A is at fault and is guilty of an assault or of causing injury, his fault does not extend to the causing of death or to the causing of serious injury which he did not foresee and in some cases could not reasonably have foreseen.
>
> In our opinion, they should not be treated as manslaughter because the offender's fault falls too far short of the unlucky result. So serious an offence as manslaughter should not be a lottery. For this reason the judges decided in 1901 that in cases of manslaughter where death results from an

[114] (5th ed, 1990) p 130.

[115] Crimes Bill 1989 (1991) p 46. The Committee, chaired by Mr Justice Casey, was asked to consider the provisions of the Crimes Bill 1989 which had been introduced by the previous administration to reform the criminal law as previously codified by the Crimes Act 1961.

[116] Recodifying the Criminal Law, Report 31, at pp 56-57.

> assault the punishment should pay no regard to the death. This recommendation has not taken full effect, because it is still regarded as permissible to add to the sentence on account of the fact that death has resulted; even so, the sentence is generally held within the range thought to be appropriate to an assault.[117] If the offence is treated for sentencing purposes as an assault (even though it is an assault with aggravating features) there seems to be no reason for calling it manslaughter. Indeed, the name is positively objectionable for several reasons, among which are the fact that it gives a false idea of the gravity of the defendant's moral offence and that there is always the possibility that it may receive a punishment going beyond that appropriate to the assault.[118]

2.53 Our provisional view is that we agree with the CLRC. On principle, it seems to us that is inappropriate to convict a defendant for an offence of homicide where the most that can be said is that he or she ought to have realised that there was a risk of some, albeit not serious, harm to another resulting from his or her commission of an unlawful act. We have noted in paragraphs 2.48-2.51 above how thinking along these lines is being developed in other common law jurisdictions which still retain a law similar to our own, and how in the United States a major change was set in motion when misdemeanour-manslaughter was omitted from the Model Penal Code published in 1962.

2.54 A further reason for considering that unlawful act manslaughter is an inappropriate feature of modern criminal law is derived from the fact that, as we have observed, courts have sought to cut down its range by introducing a variety of limitations. These attempts, though understandably derived from the courts' realisation of the very severe implications of the doctrine if it were literally applied, have been completely unco-ordinated, and (as is commonly the case where policy is sought to be implemented through the decisions of courts on the common law) have led to serious uncertainty in the law.[119] Nor, in the event, have such endeavours been particularly successful in limiting unlawful act manslaughter. The understandable feeling, in cases like *Newbury*, that something should be done to mark the fact of death occurring in the course of undesirable activities on the part of the accused[120] has inhibited moves which, if taken to their logical extreme, as

[117] See now *Ruby* (1987) 9 Cr App R(S) 305; and *Coleman* (1991) 13 Cr App R(S) 508. In the first of these cases Lord Lane CJ held that there is an element in the sentence which represents the fact that death has ensued; in the second that the starting point for sentencing in cases where death has ensued accidentally from an unlawful blow struck in the course of a fight should be a sentence of 12 months' imprisonment on a plea of guilty.

[118] Criminal Law Revision Committee, Fourteenth Report, Offences against the Person (1980), para 120, p 56.

[119] The Canadian Supreme Court has recently (in *Creighton*, April 1993, unreported) divided 5:4 on the proper definition of unlawful act manslaughter. The majority required merely objective foreseeability of the risk of non-trivial bodily harm, in the context of an unlawful and dangerous act. The minority, per Lamer CJC, required objective foresight of the risk of *death*.

[120] We provisionally suggest an alternative way in which the law could mark the fact that an assault has resulted in death in paras 5.8-5.13 below.

in some jurisdictions in Australia,[121] would entail the practical abolition of unlawful act manslaughter as a separate crime.

2.55 The consequence of this reluctance to place further limits on the scope of unlawful act manslaughter is, however, the continuation of a law in which liability for a serious criminal offence largely turns, as the CLRC perceived, on chance; and where confusion and injustice of the order that occurred in *Scarlett* are always liable to recur. If it continues to be thought appropriate on policy grounds that the law should retain the capability of imposing punishment to mark the serious factual occurrence of the accused having caused death, even where he or she neither foresaw nor intended that death, then our provisional view is that possibility should be pursued through the alternative branch of involuntary manslaughter, manslaughter by gross negligence, to which we now turn. As our exposition in Part III of this Paper will show, the policy issues which are entailed in punishing the accused by reference to the result that he has caused (as opposed to punishing him primarily by reference to his intentions or legal or moral culpability in relation to that result), can be rationally identified and discussed in relation to that branch of manslaughter, in a way which is quite impossible in the confused world which is inhabited by unlawful act manslaughter.

2.56 In Part V of this Paper we will invite readers to tell us if they believe that something along the lines of the present law of unlawful act manslaughter should be retained as part of our law, and if so, what form it should take. We have expressed our own provisional view at this early stage because it forms a necessary backcloth for what we consider to be much more pressing, and difficult, questions for contemporary discussion in connection with involuntary manslaughter. These involve asking whether there should continue to be an offence of "gross negligence" manslaughter and, if so, what the limits of that crime should be. It is to those questions that we now turn.

[121] See for instance at para 2.50 above.

PART III

GROSS NEGLIGENCE MANSLAUGHTER

A. Introduction

3.1 In this Part we will examine the law which at present governs all cases of involuntary manslaughter other than unlawful act manslaughter. It will be seen that here the basic requirement for a conviction for manslaughter is that a person must have caused the death of another through his or her "gross negligence" or "recklessness". However, it is at present extremely uncertain as to what is meant by these two fault terms. It is not even clear whether the two terms describe two different categories of manslaughter or are just different ways of describing the same thing.

3.2 In order to try to determine what the present law is, a careful examination of the way it has developed is inescapable. It is difficult to reduce this examination to an orderly form, because of the overlapping lines of authority, and the inconsistent and ambiguous language which is used in many of the cases. A certain amount of repetition, and indeed of speculation, has proved unavoidable, and we must seek the reader's indulgence for this.

3.3 As Lord Atkin noted in *Andrews v DPP*,[1] early case-law indicated that to cause death by any lack of care whatsoever would amount to manslaughter. However, as the law became more humane, a narrower criterion appeared: "men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence".[2] Lord Atkin explained how this process was begun in medical cases, in which the mental fault required for manslaughter came to be established as "gross negligence". The case of *Bateman*[3] can be seen as the starting point for the development of this modern law, and for this reason we turn immediately to an account of this case.

B. *R v Bateman*

3.4 *Bateman*[4] was concerned with an appeal by a doctor against his conviction for manslaughter after a woman had died as a result of an operation he had negligently performed upon her. The appeal was allowed because the judge had failed to distinguish clearly between negligence sufficient for a civil action for damages and the degree of negligence required for the criminal offence of manslaughter. Lord Hewart CJ gave what became a classic direction on gross negligence manslaughter:

[1] [1937] AC 576 (HL).

[2] [1937] AC 576, 582.

[3] (1925) 19 Cr App R 8 (CA).

[4] (1925) 19 Cr App R 8.

> If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove...that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A's negligence amounted to a crime...[I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[5]

3.5 It can be seen that the *Bateman* formulation of gross negligence manslaughter, which was approved in principle by the House of Lords in *Andrews v DPP*,[6] involved the following elements:- (1) the defendant owed a duty to the deceased to take care; (2) the defendant breached this duty; (3) the breach caused the death of the deceased; (4) the defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment. Whilst no special rule of causation (the third *Bateman* element) is applied to this type of manslaughter, the remaining three elements have all created difficulty, and the precise nature of their operation is still uncertain. It is therefore necessary to examine each of them individually, and this examination follows in paragraphs 3.6-3.58 below.

C. Negligence and the duty to take care

3.6 The word "negligence" is ambiguous since it can bear two meanings. Its first, "non-legal", meaning is carelessness, which is closely related to indifference, disregard and therefore recklessness, as will be seen in the examination of the case-law in paragraphs 3.69-3.76 below. The second, "legal", meaning of the word imports the requirement of a duty of care which has been breached in some way.

3.7 It has long been recognised in the law of tort that there may be cases where it may be clearly established that there has been negligence, in the sense of carelessness, in the absence of which damage would not have occurred, but because of the absence of any duty to the plaintiff, no liability arises under English law.[7] This concept is a means of expressing the limitation of legal liability on policy grounds;[8] and a large body of case-law has built up concerning the circumstances in which a legal duty of care is owed by one person to another.

[5] (1925) 19 Cr App R 8, 10-12.

[6] [1937] AC 576.

[7] See, for instance, per Greer LJ, *Farr v Butter Bros & Co* [1932] 2 KB 606, 618.

[8] Citations could be legion. For a recent famous example see Lord Bridge of Harwich in *Caparo plc v Dickman* [1990] 2 AC 605, 618C-F.

3.8 In the law of manslaughter, however, there has never been any serious examination of the concept of "duty of care", of the kind that has occupied the civil law of negligence. Although, as was noted at paragraph 3.5 above, the first element of the *Bateman* formulation of gross negligence manslaughter was the existence of a duty to *take* care owed by the defendant to the deceased, this is little more than a reiteration of the fact that, where that "duty" has been broken, the defendant's conduct has indeed been care*less*.

3.9 In the law of gross negligence manslaughter, therefore, the concept of "duty" performs two functions. The first, which is examined in detail at paragraphs 3.11-3.22 below, is to limit the class of circumstances in which a person may be guilty of manslaughter by reason of his or her *failure* to act. A person may only be held culpable for an omission where the law imposes a positive *duty to act*.

3.10 The second function which the concept of "duty" appears to perform in the law of gross negligence manslaughter is more elusive. It follows from the basic idea of carelessness referred to in paragraph 3.7 above, and relates to the *standard of care* which the law requires from a person. This second meaning is discussed at paragraphs 3.23-3.30 below.

The duty to act: liability for omissions

3.11 As we observed in our consultation paper on Offences against the Person and General Principles,[9] the questions of whether and to what extent criminal liability should be imposed for an omission to act have long been recognised as difficult and controversial. There is no *general* rule in the criminal law imposing a duty to act. However, in the law of manslaughter a number of discrete cases in which there is a duty to act have become established.[10]

3.12 The courts were first able to impose a duty to act for the helpless by extending the principle of the Poor Law, which exempted parish councils from the duty to maintain the sick and those without means of support if persons in defined classes of relationship to such people were, in theory, able to support them. The Poor Law was therefore primarily a negative piece of legislation, but the courts turned it around to impose a *positive duty* to support their relatives upon those who came within the defined classes of relationship. The neglect of that duty, where the other died in consequence of that neglect, was manslaughter. This rule was applied to husbands in respect of their wives, and to parents in respect of unemancipated children.

[9] Legislating the Criminal Code: Offences against the Person and General Principles (1992) Consultation Paper No 122, paras 6.1-6.20.

[10] Reference has been made in this section to Glazebrook "Criminal Omissions: The Duty Requirement in Offences against the Person" (1960) 76 LQR 386; Williams, *Textbook of Criminal Law* (2nd ed, 1983) pp 262-266; and Smith and Hogan, *Criminal Law* (7th ed, 1992) pp 45-52.

3.13 Once the concept of a duty to save life had become established as a basis for a conviction of manslaughter, it was possible to expand the list of duties. A duty was also imposed as a result of contract, where an employer received an employee or apprentice into his house. The employer was regarded as impliedly undertaking to provide the necessities of life if the other became ill or was unable to withdraw from his control.

3.14 This principle was expanded so that a contractual duty could give rise to criminal liability if persons outside the contractual relationship, but nonetheless likely to be injured by failure to perform the contractual duty, were killed. One example of this is seen in the case of *Pittwood*.[11] A railway crossing gate-keeper had opened the gate to let a cart pass and then went off to his lunch, forgetting to shut it again, thereby allowing a haycart to cross the line and be struck by a train. He was convicted of manslaughter. It was argued on his behalf that he owed a duty only to his employers, the railway company, with whom he had contracted. Wright J held, however, that

> ...there was gross and criminal negligence, as the man was paid to keep the gate shut and protect the public... . A man might incur criminal liability from a duty arising out of contract.[12]

3.15 During the second half of the nineteenth century the class of relationships of duty capable of imposing criminal liability in the event of omissions was also extended to voluntary undertakings, as where a person received into her house a young child or some other person who was unable to care for himself. The undertaking was expressly or impliedly given to a relative or to the previous custodian of the person received.[13] The next step involved the extension of this duty to cases where there had been no promise to care for the person received. In order to achieve this the courts took advantage of an ambiguity in the word "undertaking", which could mean either a promise to do something or actually doing it.

3.16 This ambiguity which, as Williams points out,[14] was used as cover for an extension of the law, could be seen in operation in the modern case of *Stone and Dobinson*.[15] The prosecution alleged that the appellants had undertaken the duty of caring for a relative called Fanny, who was incapable of looking after herself; that they had with gross negligence failed in that duty; that such failure caused her death; and that they were, as a result, guilty of manslaughter.[16] The defence argued that, by the mere fact of becoming infirm and helpless while staying at her brother's house, Fanny did not cast a

[11] (1902) 19 TLR 37.

[12] (1902) 19 TLR 37, 38.

[13] Glazebrook, 76 LQR 386.

[14] Williams, *Textbook of Criminal Law* (2nd ed, 1983) pp 262-263.

[15] [1977] QB 354 (CA).

[16] [1977] QB 354, 359G.

duty on her brother and Mrs Robinson to take steps to have her looked after. No duty was cast upon them to help, any more than it would be cast upon a person to rescue a stranger from drowning. The court rejected this argument:

> Whether Fanny was a lodger or not she was a blood relative of the appellant Stone; she was occupying a room in his house; the appellant Dobinson had undertaken the duty of trying to wash her, of taking such food to her as she required. There was ample evidence that each appellant was aware of the poor condition she was in by mid-July. It was not disputed that no effort was made to summon an ambulance or the social services or the police despite the entreaties of Mrs Wilson and Mrs West. A social worker used to visit Cyril. No word was spoken to him. All these were matters which the jury were entitled to take into account when considering whether the necessary assumption of a duty to care for Fanny had been proved... . This was not a situation analogous to the drowning stranger. They did make efforts to care.[17]

The court therefore found a duty arising from the facts that the deceased was a blood relative of one of the appellants and occupying a room in his house; and that the other appellant had taken steps to care for her and had thereby "undertaken" to do so.

3.17 The court held that the question of the existence of a duty was a question of fact for the jury rather than a matter of law for the judge. No issue was raised as to whether Fanny had herself chosen to reject food and medical care, so that the question whether the appellants should have been expected to override her wishes (if those were her wishes) at a time when suicide was no longer criminal did not arise for decision.[18]

3.18 In contrast, the case of *Smith*[19] explicitly raised the question whether there was a duty to summon medical assistance for a person of full age and in full possession of her faculties who appeared not to desire it. Griffiths J, who was the trial judge, left it to the jury "to balance the weight that it was right to give to this wish against her capacity to make rational decisions":

> If she does not appear too ill it may be reasonable to abide by her wishes. On the other hand, if she appeared desperately ill then whatever she may say it may be right to override.[20]

[17] [1977] QB 354, 361E-F.

[18] The Commission is currently carrying out a wide-ranging examination of the law and procedures relating to decision-making for adults who lack mental capacity. In our Consultation Paper Mentally Incapacitated Adults and Decision Making: A New Jurisdiction (1992) LCCP 128, we provisionally propose a new definition of "incapacity". We expect to submit our report to the Lord Chancellor in the course of 1994.

[19] [1979] Crim LR 251.

[20] [1979] Crim LR 251, 253.

The duty owed by experts

3.19 The question of the duty owed by doctors and others "professing special knowledge and skill"[21] to patients and others who rely on their expertise is a different one because here the harm is frequently caused not by an *omission* to do an act but by the *performing of the act badly*.

3.20 The nature of this duty was discussed in *Bateman*.[22] It arises when a person holds himself out as an expert and thereby induces others to rely on his expertise:

> If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.[23]

3.21 Although not explicitly stated, it is probable that this was the type of case to which Lord Taylor CJ was referring in *Prentice*[24] when he spoke of "manslaughter by breach of duty". That case is discussed in detail at paragraphs 3.121-3.155 below.

Other instances of the duty to take care

3.22 Smith and Hogan[25] suggest that people who jointly engage in a hazardous activity, whether lawful (like mountaineering) or unlawful (like drug abuse),[26] may also owe duties to one another, although there is not yet any authority to this effect.

The "duty of care" as "standard of care"

3.23 The use of the concept of "duty" in the law of gross negligence manslaughter, however, exceeds the limited function which has been discussed in paragraphs 3.11-3.22 above. As we observed at paragraph 3.10, the courts have also used this term, somewhat imprecisely, to describe the *standard* of care which could be expected from a person. For example, Lord Atkin in *Andrews v DPP*[27] spoke of:

[21] *Bateman* (1925) 19 Cr App R 8, 12.

[22] (1925) 19 Cr App R 8.

[23] (1925) 19 Cr App R 8, per Lord Hewart CJ at p 12.

[24] [1993] 3 WLR 927.

[25] *Criminal Law* (7th ed, 1992) p 48-9.

[26] The point was not decided in *Dalby* [1982] 1 WLR 916: cf *People v Beardsley* (1907) 113 NW 1128.

[27] [1937] AC 576 (HL).

> ...an unintentional killing caused by negligence, that is, the omission of a duty to take care.[28]

It is inconceivable that he was using the phrase "duty to take care" in this context in the sense of imposing criminal liability for omission. The case did not fall into one of the limited categories in which such liability arises: it was a case of motor manslaughter. What meaning, then, should be ascribed to the words he used?

3.24 We have observed, at paragraph 3.6 above, how the word "negligence" has two meanings. Its first, "legal", meaning is derived from the law of tort, where it imports the requirement that a legally recognised duty of care was owed by the defendant to the plaintiff. The more everyday meaning of the word equates to "carelessness". It would appear that Lord Atkin in *Andrews* conflated these two meanings. In the extract quoted above he defined negligence as "omission of the duty to take care"; but he then went on to propose the word "recklessness" as a good description of gross negligence. "Recklessness" roughly equates to the second, "non-legal", meaning of "negligence", to which the existence or otherwise of a duty of care is irrelevant. It is possible to conclude, therefore, that Lord Atkin meant nothing more by the words "omission of a duty to take care" than that the defendant had been *care*less.

3.25 In other cases[29] the courts have used the concept of duty in a similarly unspecific way. For example, some confusion as to the meaning of this term can be observed from the extract from *Stone and Dobinson* we quoted at paragraph 3.16 above. The court moved from identifying the matters which were relevant to the question whether the defendants owed a *duty to act*, and began to list examples of the ways in which the defendants had failed properly to perform that duty. It referred to the evidence that the appellants were aware of the poor state of Fanny's health but had made no effort to summon help, but then treated those failings as matters that the jury were entitled to take into account in considering whether *the necessary assumption of a duty to care for Fanny* had been proved.[30]

Breach of the duty: the standard of care

3.26 We described in paragraph 3.5 above how the second element required by the *Bateman* formulation of gross negligence manslaughter was breach of the duty owed by the defendant to the deceased. The question whether the defendant was in breach of his duty towards the deceased inevitably raises the issue of the standard of care which should be expected from a person in his situation, since there can only be a breach if the defendant's conduct fell below that standard.

[28] [1937] AC 576, 581.

[29] Most recently *Prentice*: see paras 3.121-3.155 below.

[30] [1977] QB 354, 361 (emphasis added).

3.27 The standard required from those under a duty to act was discussed obliquely, but only as a matter for judgment on the part of the jury, in *Stone and Dobinson*.[31] The standard required of those who do not fall within the category of "breach of duty" cases, on the other hand, has become subsumed within the general test of gross negligence or recklessness.[32]

3.28 The standard required of experts was discussed at some length in *Bateman*. Lord Hewart CJ said merely that the appropriate standard of care was a question of law and it was for the jury to say whether that standard had been reached. The law required a fair and reasonable standard of care and competence. This standard of care applied equally to all the elements which comprised the defendant's "duty of care": diligence, care, knowledge, skill and caution in administering the treatment.[33]

3.29 On the question whether a different standard should be applied to an unqualified practitioner than to a qualified person, Lord Hewart CJ distinguished between cases of incompetence and cases of recklessness. In cases of alleged incompetence, the standard to be applied to an unqualified practitioner was the same as that applied to a qualified person.[34] This was probably because the defendant in such a case must have held himself out to possess special skill and knowledge and voluntarily undertaken to treat the patient: "[t]here may be recklessness in undertaking the treatment and recklessness in the conduct of it".[35] Lord Hewart used the word "recklessness", for the most part, as a species of negligence in the context of undertaking to provide treatment which it was beyond the defendant's skill to provide. Although qualified doctors were less likely to be guilty of this conduct, it was the same standard of care which applied to all.

3.30 A similar standard is required in New Zealand, the other major common law jurisdiction which has considered this question:

> ...a greater degree of care than a reasonable degree of care is not required of a person with some professional qualification. We think that under both ss 155 and 156 of the Crimes Act the test for negligence is objective. A person undertaking (except in case of necessity) to administer medical treatment is under a legal duty to exercise the reasonable knowledge, skill and care called for from a medical practitioner holding himself out as undertaking that kind of treatment. A person undertaking the driving of a power boat is under a legal duty to exercise reasonable knowledge, skill and care in doing so, that is to say, as the Judge put it, such as would be

[31] See para 3.16 above.

[32] For which see paras 3.31-3.41 and 3.59-3.82 below.

[33] (1925) 19 Cr App R 8, 12.

[34] (1925) 19 Cr App R 8, 13.

[35] (1925) 19 Cr App R 8, 13.

> exercised by a reasonable boatman or boatwoman. The position is essentially the same under s 156. The standard of care is not increased by the fact that the defendant happens to have special skills or a certain certificate.[36]

Gross negligence

3.31 The fourth and final element of the *Bateman*[37] formulation, and the issue on which the appeal in that case actually turned, was that, in order to impose liability for manslaughter, the defendant's negligence must have been "gross". Before turning to consider this requirement, however, we must first consider the basic nature of "negligence" as perceived by the court in *Bateman*.

3.32 It was clear that the test for negligence envisaged by the Court of Appeal in *Bateman* was an objective one: the defendant's conduct was to be judged against an external standard. Despite Lord Hewart's assertion that "there must be mens rea",[38] the defendant's state of mind was largely irrelevant so long as his conduct was grossly negligent. This can be seen from the words used to describe different species of negligence: indolence, carelessness, gross ignorance, unskilfulness, incompetence.[39] The defendant was negligent if he "recklessly under[took] a case which he knew, or should have known, to be beyond his powers" or if he "undertook, and continued to treat, a case involving the gravest risk to his patient, when he knew he was not competent to deal with it, or would have known if he had paid any proper regard to the life and safety of his patient".[40]

3.33 In his final, much quoted, formulation of criminal negligence, Lord Hewart said that the defendant's conduct must have shown "...disregard for the life and safety" of the deceased.[41] According to the Oxford English Dictionary,[42] "disregard" simply means:

> Want of regard; neglect; inattention; in earlier use often, the withholding of the regard which is due, slighting, undue neglect; in later use, the treating of anything as of no importance... .

It is not clear whether such lack of attention or neglect requires that the defendant be aware of the subject of his neglect or not. This ambiguity is discussed in detail in connection with the word "indifference", at paragraphs 3.69-3.76 below.

[36] *Myatt* [1991] 1 NZLR 674, 682; see also *Burney* [1958] NZLR 745.

[37] See para 3.5 above.

[38] (1925) 19 Cr App R 8, 11.

[39] (1925) 19 Cr App R 8, 12-13.

[40] (1925) 19 Cr App R 8, 13.

[41] (1925) 19 Cr App R 8, 13.

[42] (Compact ed, 1971).

3.34 The *Bateman* formulation also requires that the negligence be in relation to a risk of serious harm or death to the deceased, a risk to her "life and safety".[43]

3.35 The distinction between civil and criminal negligence is one of degree, and one which has proved difficult to express. In paragraph 3.4 above we observed that in *Bateman* Lord Hewart used the following formulation:

> [I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[44]

3.36 As a definition, this is circular: he is saying that the jury should convict the defendant of a crime if they found that his behaviour was criminal. This passage has also been criticised on the ground that it leaves questions of law[45] and of sentencing[46] to the jury. As Lord Atkin said in *Andrews v DPP*:

> I do not myself find the connotations of mens rea helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment.[47]

3.37 Lord Atkin, did, however approve the substance of the judgment,[48] although he then went on to propose the word "recklessness" as a good way of describing "gross negligence". As will be seen in paragraphs 3.59-3.120 below, subsequent cases have tended to focus on "recklessness" to the extent that it was thought at one time that gross negligence had ceased to exist as a ground of manslaughter.[49]

3.38 The *Bateman*[50] test of gross negligence was more frequently applied, however, in cases of medical or surgical negligence. *Akerele*[51] provides an example of how it operated in practice. The accused was a medical practitioner in Nigeria. Ten children died after he

[43] (1925) 19 Cr App R 8, 13.

[44] (1925) 19 Cr App R 8, 10-12.

[45] For example, by Turner in *Russell on Crime* (12th ed, 1964), pp 592-594.

[46] By Williams, *Textbook of Criminal Law* (7th ed, 1983) at p 259.

[47] [1937] AC 576, 583.

[48] [1937] AC 576, 583.

[49] See paras 3.110-3.112 below.

[50] (1925) 19 Cr App R 8.

[51] [1943] AC 255.

had treated patients with a drug which he had prepared. He was convicted of manslaughter and appealed to the Privy Council. The Board held that the judge had been correct to direct the jury on the basis of the *Bateman* formulation of criminal negligence. It considered, however, that to dispense too strong a mixture on one occasion only, without "a high degree of care", did not indicate a *criminal* degree of negligence.

3.39 In its opinion the Privy Council referred to two other cases of medical negligence resulting in death. In *Noakes*[52] a customer sent two bottles of medicine to a chemist who accidentally confused them, and the customer died as a result of taking the wrong one. Erle CJ left the case to the jury, but put it to them that the case was not sufficiently strong to warrant a finding that the prisoner was guilty on a charge of felony. In *Crick*[53] the accused, who was not a regular practitioner, had administered a dangerous medicine which had produced death. Pollock CB said

> If the prisoner had been a medical man I should have recommended you to take the most favourable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.[54]

3.40 The Privy Council in *Akerele* said that these cases rightly stressed the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

3.41 It was therefore difficult in early cases to find a doctor guilty of manslaughter by gross negligence, both because of the strictness of the *Bateman* test and because doctors tended, rightly, to be given the benefit of the doubt as to whether negligence had been established which went beyond a mere question of compensation between individuals. Eventually it became comparatively rare for doctors even to be charged with a criminal offence when death resulted from their negligence.[55]

[52] (1886) 4 F & F 921; 176 ER 849.

[53] (1859) 1 F & F 519; 175 ER 835.

[54] (1859) 1 F & F 519, 520.

[55] This trend has been reversed in recent years, which have seen the prosecution and conviction of Drs Sergeant, Adomako, Sullman and Prentice. This has probably been a consequence of the decision in *Seymour*, The cases of Drs Adomako, Sullman and Prentice on appeal are discussed at length at paras 3.121-3.155 below.

Gross negligence in other jurisdictions

3.42 It is not universally accepted in other jurisdictions that, for manslaughter, the accused's negligence should be "gross" (meaning thereby that the negligence should, in some unspecified respects, be significantly worse than what would found *civil* liability). The difficulties of defining, or even describing, *gross* negligence have been seen in some jurisdictions as a reason for falling back on the more familiar civil law. In others, the standard of the law of tort has been thought to be far too severe for *criminal* liability. In the following paragraphs we give a brief account of these differences, since this furnishes some indication of the particular difficulties of this part of the law.

3.43 Section 171 of the New Zealand Crimes Act 1961 imposes no requirement that the negligence should have been "gross": a civil standard is applied. This principle was confirmed by the New Zealand Court of Appeal in *Dawe*.[56] A tramway motorman was charged with manslaughter.[57] He had allowed the tram-car he was driving to collide with a lighted car standing on the line, which was about to be coupled to a broken-down car. A man standing between them was crushed to death. The accused said that he did not see the lights of the broken down tram until it was too late. He gave three reasons for this failure: first, that he was distracted by a passenger in his tram ringing the electric bell; secondly, that he had narrowly missed running over a drunken man who had lurched in front of his tram about an hour and a half earlier and was still shaken by this incident; and thirdly that he was looking out for passengers at a request stop as he rounded the corner. The jury returned the following written answer to the question whether the prisoner was guilty or not guilty : "We consider the accused guilty of neglect of duty caused by extenuating circumstances, but not gross neglect, and strongly recommend him to mercy."

3.44 The Court of Appeal was asked to determine the precise meaning of this verdict, and held that the verdict was a general verdict of "guilty" with a strong recommendation to mercy. The court rejected the distinction drawn between gross negligence and other forms of negligence:

> ...section 171 of the Crimes Act, 1908, disposes, and was probably intended to dispose of in respect of all cases within its purview, of the distinction between "negligence" and "gross negligence" which there is at least strong ground in contending has been established by a number of English decisions.[58]

and stressed that under the Crimes Act a simple test of "negligence" was to be applied:

[56] (1911) 30 NZLR 673.

[57] The charge was based on the Crimes Act 1908, s 171, (now s 156) which imposed duties on those in charge of dangerous things.

[58] (1911) 30 NZLR 673, 682-3 per Denniston J.

> In order in such a case to sustain an indictment for manslaughter it is not necessary for the Crown to prove gross negligence. It is sufficient if it is established that the person charged with the offence has failed to take reasonable precautions against, and has failed to use reasonable care to avoid, the danger.[59]

3.45 The civil negligence test was challenged in a recent New Zealand Court of Appeal case, *Yogasakaran*.[60] An emergency arose after a surgical operation when the patient, who was still under general anaesthetic, began to have difficulty in breathing. The accused anaesthetist quickly decided to inject her with a drug called Dopram, which was a proper method of treatment. From the top drawer of a trolley marked "Dopram" he took a packet of plastic containers and injected the contents of one of the containers into the patient. The drug injected was in fact a different drug, dopamine, and the patient died as a consequence. The defendant was convicted of manslaughter contrary to sections 160(2)(b) and 171 of the Crimes Act 1961.

3.46 The main ground of appeal was that the judge should have directed the jury that what was required was a high degree of negligence, or gross, or culpable negligence, in line with the common law of England and the codified law of Australia and Canada,[61] and that he should not have followed the law as settled in New Zealand by earlier Court of Appeal decisions.[62] Cooke P, delivering the judgment of the court, recognised that the position in New Zealand was indeed different from that in England, Canada and Australia, but after referring to the difficulties which have arisen in those countries in trying to define gross negligence, said that "the New Zealand law as hitherto understood has at least been straightforward".[63] He continued:

> In theory the New Zealand rule might seem at first sight too severe, but in practice its effect is mitigated by the necessity for the Crown to prove causative negligence beyond reasonable doubt. Juries do not lightly find manslaughter by negligence and there is the exceptionally wide judicial discretion as to penalty already mentioned.[64] We are not aware of any case, including the present, in which the long-standing rule in New Zealand has produced an unjust result.[65]

[59] *Ibid*, at p 687, per Cooper J.

[60] [1990] 1 NZLR 399.

[61] For the position in Australia and Canada, see paras 3.49-3.52 and 3.85-3.88 below.

[62] *Dawe* (see para 3.44 above) and *Storey* [1931] NZLR 417.

[63] [1990] 1 NZLR 399, 404.

[64] In this case the judge was satisfied that there were extenuating circumstances to such an extent that he merely gave effect to the jury's verdict by treating the accused as convicted and discharged him without sentence as authorised by s 20 of the Criminal Justice Act 1985. This aspect of the case was discussed by Cooke P at pp 401-402.

[65] [1990] 1 NZLR 399, 404.

3.47 The position in the Republic of South Africa is the same. There the Appellate Division has unequivocally asserted: "the test of liability should be the same in both [civil and criminal negligence]".[66] The degree of negligence is relevant only to sentence and not to the incidence of liability.[67]

3.48 However, the law of most other Commonwealth jurisdictions makes a marked distinction between the standards of negligence in the areas of civil and of criminal liability. A comparative study published in 1985 showed that although there had been a tentative tendency in Singapore and Sarawak, North Borneo and Brunei towards assimilation of the criteria of civil and criminal negligence, a clear demarcation of the respective standards was a feature of the law of Malaysia, India and Nigeria.[68]

3.49 Similarly, the Tasmanian Criminal Code Act 1924 requires that the negligence be culpable (that is gross) to found a charge of manslaughter. The Act is similar to the New Zealand Crimes Act 1961 in that it first sets out a number of clearly defined duties relating to the preservation of human life, followed, at section 156, by a definition of culpable homicide. Murder is then defined, at section 157, as a category of culpable homicide. Section 156(2)(b) of the Code defines culpable homicide by omission:

> 156 - (1) Homicide may be culpable or not culpable.
>
> - (2) Homicide is culpable when it is caused-
> (b) by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm; ...
>
> - (3) The question what amounts to culpable negligence is a question of fact, to be determined on the circumstances of each particular case.

3.50 It can be seen that this provision, in contrast to section 171 of the New Zealand Crimes Act 1961, has a requirement that the omission should amount to *culpable* negligence, comparable to the English concept of gross negligence. The Supreme Court of Tasmania confirmed in *Davies*[69] that the "culpable negligence" referred to in section 156(2)(b) requires negligence of a greater degree than civil negligence. Crisp J said:

[66] *Meiring* 1927 AD 41, 46 per Innes CJ: cited by Burchell and Hunt *South African Criminal Law and Procedure* (2nd ed, 1983) vol 1, p 196-97.

[67] GL Peiris, "Involuntary Manslaughter in Commonwealth Law" [1985] 5 Legal Studies 21.

[68] GL Peiris, "Involuntary Manslaughter in Commonwealth Law", *op cit*, at pp 25-26.

[69] [1955] Tas SR 52.

> ...it is plain, firstly, that tortious acts merely or acts which are wrongs of mere negligence - should death result- cannot make the offender liable to a charge of manslaughter, because under para II the omission required is one which amounts to culpable negligence which, as a matter of accepted law, is a much higher degree of negligence than what would normally be found or required in the ordinary tort of negligence.[70]

3.51 Similarly in a Queensland case, *Scarth*,[71] it was held that a breach of the duties imposed by the Criminal Code Act 1899 concerning the preservation of life must be gross in order to found a charge of manslaughter. The accused fell asleep at the wheel of the car he was driving which collided with three persons who were attending to a broken down motor-cycle. The driver was convicted of manslaughter, but this conviction was overturned by the Court of Appeal. The majority (Philp J dissenting on this point) held that in order to base a charge of manslaughter on a breach of the duty imposed by section 289, gross negligence would have to be proved.

3.52 The provisions of the Criminal Code 1913-1945 (Western Australia) are very similar to those in Queensland. The High Court of Australia, on appeal from the Court of Criminal Appeal of Western Australia, confirmed in the case of *Callaghan*[72] that a breach of duty needed to be gross before it could found a conviction for manslaughter. The accused had been found guilty of dangerous driving causing death contrary to section 291A of the Criminal Code,[73] after having been charged with manslaughter. The judge had correctly directed the jury that if there was evidence of lack of care but not gross lack of care then their verdict should be dangerous driving causing death. If they thought it was gross negligence then the verdict should be manslaughter.

3.53 The United States Model Penal Code creates a separate offence of negligent homicide based on inadvertent risk-taking. This offence is distinct from that of manslaughter, which is an offence based on *subjective* recklessness. There is a requirement of gross negligence for the former offence. Virtually all modern revision efforts in the United States follow the Model Penal Code by treating negligent homicide as requiring a criminal degree of

[70] [1955] Tas SR 52, 55.

[71] [1945] St R Qd 38.

[72] (1952) 87 CLR 115.

[73] Section 219A was introduced into the Criminal code by the Criminal Code Amendment Act 1945. It provided:

> (1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years.
>
> (2) This section shall not relieve a person of criminal responsibility for the unlawful killing of another person.

negligence,[74] with the exception of Puerto Rico where liability is based on ordinary negligence.[75]

3.54 For example, the New York Penal Law defines negligent homicide as follows:-

> § 125.10 CRIMINALLY NEGLIGENT HOMICIDE
> A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

3.55 "Criminal negligence" in these formulations requires a degree of negligence significantly different from that required in civil cases. For instance in *Gates*[76] it was held that criminal negligence would be established if there was a failure to perceive a substantial and unjustifiable risk of death, constituting a gross deviation from the standard conduct or care that a reasonable person would observe in the situation.

3.56 In Scotland[77] culpable homicide short of murder is divided into two crimes, somewhat along the lines of involuntary and voluntary manslaughter in England and Wales. The first, involuntary culpable homicide, is distinguished from murder by reference to the mens rea of the offender, while voluntary culpable homicide turns on mitigating circumstances. Involuntary culpable homicide is the causing of death unintentionally but either with a degree of negligence sufficient to make the homicide culpable but not murderous, or in circumstances in which the law regards the causing of death as criminal even in the absence of any negligence (usually in cases of unlawful acts).

3.57 It was at one time the law of Scotland that to cause death by negligence was always culpable homicide, however slight the degree of negligence, and however lawful the conduct in the course of which the negligence occurred. In the modern law, however, homicide in the course of lawful conduct is culpable homicide only where the negligence was gross. Gross negligence cannot be measured by reference to any standard at all and is essentially a question of fact. According to Gordon, the best approach is for the jury to imagine they had witnessed the accused do the act, for example drive his car into a group of people. If their imagined reaction is "What a careless way to drive" then this would constitute simple negligence; whereas if it was "What a damn stupid way to drive" then this would be gross negligence.[78]

[74] All jurisdictions which have enacted revised codes, except Georgia, Illinois, Indiana, Iowa, and Nebraska, punish negligent homicide in some fashion.

[75] PR tit 33, §4005.

[76] (1986) 122 AD 2d 159, 504 NYS 2d 538.

[77] Gordon *Criminal Law* (2nd ed, 1987) pp 788-807.

[78] *Op cit*, at p 789.

3.58 It will be seen that most similar jurisdictions require a more serious standard of negligence before they will impose *criminal* liability. However, it is also apparent that, with the exception of the graphic formulation suggested by one commentator on the Scottish law,[79] the problem of defining that higher standard has nowhere been moved from the level of general formulae to any useful guidance in its practical application. Definitions employed in other jurisdictions of "culpable" or "criminal" negligence are as circular as the *Bateman* formulation, and are open to similar criticism.[80]

D. The meaning of "recklessness" before *Seymour*

3.59 It will be seen, at paragraphs 3.110-3.120 below, that a line of authority following *Seymour*[81] appeared to hold that "gross negligence" was no longer the appropriate fault term in manslaughter, and that *Caldwell* recklessness should be applied instead. Since the authority of *Seymour* is now, to put it at its lowest, in some doubt,[82] it is necessary to determine what exactly was meant by both "gross negligence" and "recklessness" before 1983. In the preceding paragraphs we considered the nature of the *Bateman* gross negligence test; we turn now to consider "recklessness" in the case-law before *Seymour*.

3.60 The first thing which is apparent from that case-law is a confusion in the use of the terms "negligence" and "recklessness". In some of the cases these words appeared to be almost interchangeable, while in others "recklessness" was used to denote a species of negligence, often a more serious type of negligence. Other cases indicated the existence of separate types of fault in manslaughter: gross negligence, subjective recklessness and, possibly, a third distinguishable fault element, indifference.

"Recklessness" as a degree of "negligence"

3.61 As we have shown at paragraph 3.29 above, Lord Hewart CJ in *Bateman* referred to recklessness as a *type* of negligence involving risk-taking. He contrasted it with incompetence, another type of negligence.

3.62 The emphasis shifted slightly in *Andrews v DPP*, where Lord Atkin appeared to use "recklessness" to describe a *degree* of negligence:

> Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all epithets that can be applied "reckless" most nearly covers the case.[83]

[79] See para 3.57 above.

[80] See para 3.36 above.

[81] [1983] 2 AC 493.

[82] See paras 3.121-3.155 below.

[83] [1937] AC 576, 583.

3.63 However, he recognised that "recklessness" could not be used as an "all-embracing" synonym for gross negligence:

> ...for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.[84]

3.64 We have already noted[85] how in this case Lord Atkin approved in principle the *Bateman* test for gross negligence manslaughter. *Andrews* therefore gave House of Lords authority to *Bateman* gross negligence as a ground of guilt for manslaughter, with recklessness merely constituting a category of gross negligence for that purpose.

3.65 When Humphreys J delivered the judgment of the Court of Criminal Appeal in *Larkin*,[86] he, too, used "recklessness" to describe a high degree of negligence:

> ...it is the duty of the presiding judge to tell [the jury] that it will not amount to manslaughter unless the negligence is of a very high degree; the expression most commonly used is "unless it shows the accused to have been reckless as to the consequences of the act".[87]

3.66 Similarly, in *Lamb*,[88] Sachs LJ spoke of "criminal negligence - often referred to as recklessness".[89]

3.67 In *Cato*[90] Lord Widgery CJ upheld the trial judge's direction that the jury should ask themselves whether the accused did "a lawful act with gross negligence, that is to say, recklessly",[91] adding robustly:

> After all, recklessness is a perfectly simple English word. Its meaning is well known and it is in common use. There is a limit to the extent to which the judge in the summing-up is expected to teach the jury the use of ordinary English words.[92]

[84] [1937] AC 576, 583.

[85] See para 3.37 above.

[86] [1941] 1 All ER 217.

[87] [1941] 1 All ER 217, 219D.

[88] [1967] 2 QB 981.

[89] [1967] 2 QB 981, 990D.

[90] [1976] 1 WLR 110.

[91] [1976] 1 WLR 110, 114E.

[92] [1976] 1 WLR 110, 119C-D.

3.68 This line of authority therefore suggested that gross negligence, as defined in *Bateman* and *Andrews*, was the sole basis of guilt in manslaughter (apart from unlawful act manslaughter); and that "recklessness" was either identical to or a category of gross negligence.

The meaning of "recklessness": indifference

3.69 Despite Lord Widgery's warning in *Cato*, other judges did attempt to define the word "recklessness". It is possible that it was through that process that the judges succeeded, perhaps without intending to do so, in establishing "recklessness" as a ground of manslaughter quite distinct from "gross negligence". Since this is the view taken by many commentators prior to *Seymour*, and the status of *Seymour* is still unclear,[93] it is important to determine the meaning given to "recklessness" in that part of the case-law.

3.70 In *Andrews v DPP* Lord Atkin stated that "reckless suggests an indifference to risk".[94] Since Lord Atkin used the word "indifference" in an attempt to define "recklessness", it is necessary to consider what is meant by the former word. The Oxford English Dictionary[95] gives the following definition of the word "indifference":

> 1. The making of no difference between conflicting parties; impartiality...
>
> 2. Absence of feeling for or against;...Absence of care for or about a person or thing; want of zeal, interest, concern or attention; unconcern, apathy...
>
> 3. Indetermination of the will...or of a body to rest or motion; neutrality...
>
> 4. The quality of being indifferent, or neither decidedly good nor evil...
>
> 5. Want of difference or distinction between things...
>
> 6. The fact of not mattering or making no difference; unimportance; esp. in phrase *a matter of indifference*; also, an instance of this, a thing or matter of no essential importance...

Thus, the definition of this word is in many respects similar to that of "disregard", the word used in the *Bateman* formulation,[96] in so far as it denotes an absence of care or attention.

[93] See paras 3.127-3.139 below.

[94] [1937] AC 576, 583.

[95] (Compact ed, 1971).

[96] See paras 3.4 and 3.35 above.

3.71 It is not clear whether a risk needs to be perceived in order for someone not to care whether or not it comes to fruition. It could be argued that a person who fails even to consider a risk exists could also be said not to care about the result of his or her actions.[97] On the other hand, is it possible to have "an absence of feeling for or against" possible outcomes without even being aware of the risk of one of those outcomes occurring?[98]

3.72 This ambiguity was not resolved elsewhere in the judgment in *Andrews v DPP*. After saying that "'reckless' suggests an indifference to risk", Lord Atkin continued by contrasting recklessness with gross negligence:

> ...whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.[99]

It is not clear whether the intended contrast was with a mental state in which the defendant would not even have appreciated the risk; or with a state in which he would have appreciated the risk but would have taken no steps to avoid it; or with a third type of state in which he could not care less about the outcome of his actions.[100]

3.73 Elsewhere, Lord Atkin observed that

> ...men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence...[101]

but it is submitted that here the intended contrast was not between inadvertence and awareness of risk but between the different degrees of fault required for gross and civil negligence.

[97] And this state of mind of course falls within the meaning ascribed to "recklessness" by Lord Diplock in *Caldwell* [1982] AC 341, 354.

[98] It is relevant to note a brief summary of *Caldwell* given by Lord Ackner in *Reid* [1992] 1 WLR 793, 803C-D, since it recognised the problem discussed here and dismissed it:

> "Reckless" accordingly bore its popular or dictionary meaning of careless, regardless, or heedless of the possible harmful consequences of one's act... . The warning given in *R v Caldwell* against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being either "subjective" or "objective" was repeated. Failing to give any thought to an obvious and serious risk of harmful consequences is neither more nor less "subjective" than ignoring such a risk, which one has recognised. Mens rea is by definition a state of mind of the accused himself at the time he did the actus reus.

[99] [1937] AC 576, 583.

[100] This ambiguity was resolved to a certain degree by the Court of Appeal in *Stone and Dobinson*, see para 3.76 below.

[101] [1937] AC 576, 582.

3.74 In some later cases "recklessness", as in *Andrews*, was used to denote indifference or lack of regard. We believe that both these expressions described a state of mind in which the defendant could not care less about the outcome of his acts. A dictum of Salmon LJ in *Gray v Barr*[102] supports this view:

> To do a lawful act which is dangerous with a reckless disregard as to whether or not it injures another is ... manslaughter: see *R v Larkin.*[103] For anyone, especially a man as unused to shotguns as was Barr, to walk up a narrow staircase carrying a loaded gun, with the safety catch off, and using it to threaten Gray who was standing at the top of the stairs was obviously dangerous. It was also strong evidence of recklessness on Barr's part; he did not care whether or not he injured Gray.[104]

3.75 In *Stone and Dobinson*[105] the Court of Appeal cited *Andrews v DPP*[106] as authority, but adapted Lord Atkin's observations on the meaning of "recklessness" and the contrast between recklessness and negligence to provide a two-limbed definition of "reckless disregard" as a fault term in manslaughter. Geoffrey Lane LJ referred to two states of mind which would satisfy the mental requirement of "a reckless disregard of danger to the health and welfare of the infirm person":

> Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.[107]

However, in this resolution the court was obliged to rewrite part of the *Andrews* formulation. The state of mind described in *Andrews* in which "the accused may have appreciated the risk and intended to avoid it and yet have shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction"[108] was

[102] [1971] 2 QB 554 (CA).

[103] [1943] 1 All ER 217.

[104] [1971] 2 QB 554, 576H-577A. This civil case, which required the Court of Appeal to decide whether the appellant's killing of the deceased was manslaughter or an accident for the purposes of an insurance claim, was considered by the House of Lords in *Newbury* [1977] AC 500. In the latter case Lord Salmon expressly disapproved a dictum of Lord Denning in *Gray v Barr* [1971] 2 QB 554, at p 568B, that "in manslaughter of every kind there must be a guilty mind...", but cited *Larkin* [1941] 1 All ER 217 with approval. Since both *Larkin* and *Newbury* are concerned with unlawful act manslaughter, and *Gray v Barr* with the question whether the death was caused by accident for the purposes of the insurance policy (and distinguished as such by Lord Salmon in *Newbury* [1977] AC 500, 508), these cases are cited merely to illustrate judicial opinion of the time.

[105] [1977] QB 354.

[106] [1937] AC 576.

[107] [1977] QB 354, 363G.

[108] [1937] AC 576, 583.

rendered in *Stone and Dobinson* as having "foreseen the risk but to have determined nevertheless to run it", clearly a quite different state of mind.

3.76 The reference to the sub-category of actual foresight in the judgment in *Stone and Dobinson* went some way to remove the ambiguities inherent in the use of the word "indifferent" in *Andrews* by indicating that that word meant that the defendant *failed to perceive* an obvious risk. *Stone and Dobinson*, standing by itself, might therefore be seen as authority for a distinct category of manslaughter by recklessness, with recklessness defined by the two-limbed test. However, since the Court of Appeal purported to be applying *Andrews*, this test could hardly have displaced the theory that recklessness remained merely a category of gross negligence. The two-limbed test, on this view, merely assisted to clarify the meaning of "recklessness" by reference to the two alternatives of indifference and foresight. On this interpretation, the type of negligence identified by Lord Atkin as falling outside the meaning of the word "recklessness", where the defendant had foreseen the risk but had been negligent in attempting to avoid it, would remain a separate ground of manslaughter.

Subjective recklessness

3.77 It has been seen, at paragraphs 3.75-3.76 above, that the Court of Appeal in *Stone and Dobinson*[109] formulated a two-limbed test of recklessness, although it was argued that recklessness remained merely a category of gross negligence as defined in *Andrews v DPP*.[110] In *Stone and Dobinson* it was held that a person was reckless if he was indifferent to an obvious risk of injury to health or if he actually foresaw the risk but determined nevertheless to run it. The case-law regarding the first limb of the *Stone and Dobinson* test, indifference, has been reviewed above at paragraphs 3.69-3.76 above. The second limb of the test reflected another line of authority which imposed a subjective test for recklessness.

3.78 For example, in the case of *Pike*[111] the Court of Appeal upheld the appellant's conviction of manslaughter and approved the trial judge's direction in the following terms:

> Did D know that inhaling CTC would expose the deceased to the danger of physical harm, and yet recklessly cause or allow her to inhale it?[112]

3.79 Six years later, in *Lamb*,[113] the trial judge had directed the jury that it was open to them to convict the defendant of manslaughter on the basis either of unlawful act manslaughter

[109] [1977] QB 354.

[110] [1937] AC 576 (HL).

[111] [1961] Crim LR 547.

[112] [1961] Crim LR 547, 547.

[113] [1967] 2 QB 981 (CA).

or of gross negligence. He directed them in connection with unlawful act manslaughter in terms commented on by Sachs LJ in the Court of Appeal as follows:

> ...[t]he general tenor of the summing-up on the first ground [unlawful act manslaughter] was thus to cause the jury to apply objective tests which withdrew from them consideration of what the defendant himself thought...they could hardly avoid starting to consider the second [criminal negligence] upon the footing that the defendant must be taken to have known that he was doing something dangerous. On that basis there was really only one verdict open to them on the second ground -- and having found him guilty on a misdirection on the first their verdict on the second would in all probability be thus wrongly affected.[114]

Sachs LJ continued by criticising the judge's summing-up in relation to the second ground, negligence, on the basis that "[n]owhere...is any mention made of the view the defendant had formed as to being able to pull the trigger without firing a bullet."[115] It would therefore appear that, in the view of Sachs LJ, evidence of the defendant's state of mind was relevant to the issue of negligence. However, he added a proviso in the following terms:

> When the gravamen of a charge is criminal negligence -often referred to as recklessness - of an accused, the jury have to consider among other matters the state of his mind, and that includes the question of whether or not he thought that that which he was doing was safe. In the present case it would, of course, have been fully open to a jury, if properly directed, to find the defendant guilty because they considered his view as to there being no danger was formed in a criminally negligent way. But he was entitled to a direction that the jury should take into account the fact that he had undisputedly formed that view and that there was expert evidence as to this being an understandable view.[116]

This formulation was similar to the test in *Andrews v DPP* or the second limb of the test in *Stone and Dobinson*. It was not clear whether Lamb would have been held to be guilty if he had not considered the possibility of there being a risk at all.

3.80 That the defendant's own realisation of risk was important could also be inferred from *Cato*,[117] in which Lord Widgery CJ declared:

[114] [1967] 2 QB 981, 989F-G.

[115] [1967] 2 QB 981, 990A.

[116] [1967] 2 QB 981, 990D-F.

[117] [1976] 1 WLR 110.

> of course in deciding whether Cato had himself acted recklessly one would have to have regard to the fact, if it was accepted, that he did not know about the potentiality of the drug.[118]

3.81 Three years later, in *Smith*[119] Griffiths J directed the jury in terms that clearly supported the view that "indifference" meant a state in which the defendant could not have cared less. However, he also imposed an unequivocal requirement that the defendant should have perceived the risk:

> "Reckless disregard" meant that, fully appreciating that she was so ill that there was a real risk to her health if she did not get help, S did not do so, either because he was indifferent, or because he deliberately ran a wholly unjustified and unreasonable risk. It was accepted that he was not indifferent — the evidence was that they were a devoted couple and that he stayed with her all the time when she was ill. It was also accepted that she did not want a doctor called, and the jury had to balance the weight that it was right to give this wish against her capacity to make rational decisions... .[120]

In the end the jury failed to agree on the manslaughter charge and were discharged; so this direction was never tested on appeal.

3.82 Against all these indications, however, there remained the leading authority of *Bateman* in which, when speaking of recklessness, Lord Hewart CJ explicitly stated the test to be capable of involving both advertence and inadvertence of risk: the defendant was at fault if he "recklessly under[took] a case which he knew, *or should have known*, to be beyond his powers".

[118] [1976] 1 WLR 110, 119C. The Lord Chief Justice also commented, rather opaquely, on the relevance of the deceased's consent to the questions of gross negligence and recklessness, saying that the judge "in a perfect world" would have directed the jury on consent in the following terms:

> It is not a defence in the sense that merely by proving [the deceased's] permission the matter is at an end; but when you come to consider the questions of gross negligence or recklessness of course you must take it into account." Whether he would have gone further we very much doubt. If a persistent juror had said: "Well, what do you mean by 'take into account'? What have we got to do?", it may very well be that the judge would be stumped at that point and really could not do any more than say "You must take it into account". Lawyers understand what it means, but jurors very often do not... . [1976] 1 WLR 110, 118A-B.

[119] [1979] Crim LR 251.

[120] [1979] Crim LR 251, 252.

The meaning of "recklessness" in the law of manslaughter of some overseas jurisdictions

3.83 A case in the Supreme Court of Victoria, *Nydam*,[121] is of interest because it demonstrates the way in which *Andrews v DPP*[122] was interpreted in this common law jurisdiction as imposing a subjective test of negligence; a test which, however, the Supreme Court was at pains to reject. Upon the trial of an accused person for the murder of two women who died from burns received as a result of an explosion of petrol ignited by the accused, the trial judge left to the jury "murder by recklessness" and "manslaughter by criminal negligence". On appeal against conviction, the court considered the latter of these two heads:

> What then is the appropriate test to be applied for manslaughter by criminal negligence? In Victoria a dictum of Smith J in *R v Holzer*[123] has been accepted as a correct statement of the law. In that case his Honour said, at p 482, "...we are not here concerned with the doctrine of manslaughter by criminal negligence, under which, as I understand the law founded upon the House of Lords' decision in *Andrews v DPP*, the accused must be shown to have acted not only in gross breach of a duty of care but recklessly, in the sense that he realized that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk."
>
> Any dictum of Smith J, a very learned judge and a most distinguished lawyer, is entitled to the greatest respect. Yet we have come to the conclusion that it ought not to be accepted as correctly propounding the test to be applied in cases of manslaughter by criminal negligence.[124]

Instead, the court gave the following description of negligent manslaughter:

> The requisite *mens rea* in the latter crime [manslaughter by criminal negligence] does not involve a consciousness on the part of the accused of the likelihood of his acts causing death or serious bodily harm to the victim or persons placed in similar relationship as the victim was to the accused. The requisite *mens rea* is, rather, an intent to do the act which, in fact, caused the death of the victim, but to do that act in circumstances where the doing of it involves a great falling short of the standard of care required of a reasonable man in the circumstances and a high degree of risk or likelihood of the occurrence of death or serious bodily harm if that standard

[121] [1977] VR 430.

[122] [1937] AC 576.

[123] [1968] VR 481.

[124] [1977] VR 430, 439-440.

of care was not observed, that is to say, such a falling short and such a risk as to warrant punishment under the criminal law.[125]

The court held that the judge had not given a direction to this effect, and that, therefore, the conviction should be quashed and a new trial ordered.

3.84 The position is less clear in New South Wales and South Australia. A summary of the case-law is provided by Gilles[126] to the effect that in the New South Wales case of *Vassiliev*[127] no exception was taken to a direction as to negligent manslaughter based upon that approved in the English case of *Bateman*.[128] Since *Bateman*, however, the authorities in England have showed a diversity of views, and the Australian authorities have reflected a similar range of opinions. On balance, perhaps, they have favoured the view that the offence was not one of mens rea, although as in the English decisions they were often ambiguous in their employment of adjectives, most obviously the adjective "reckless". The authorities tended to favour the view that the offence was based upon proof of risk-producing behaviour on the part of the defendant which was such as to produce a risk to life and limb and which was characterised as grossly negligent.

3.85 In Canada, as Stuart[129] observes, the law relating to criminal negligence is notoriously confused and convoluted. section 205(5)(b) of the Criminal Code specifically allows for culpable homicide[130] to be committed by criminal negligence. A definition of negligence is provided by section 202:

> (1) Every one is criminally negligent who
>
> (a) in doing anything, or
> (b) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons
>
> (2) For the purpose of this section, "duty" means a duty imposed by law.

3.86 The case-law exhibits a number of different solutions to the proper interpretation of this section which, it will be observed, employs the language of "duty" which we have noted as a source of difficulty in paragraphs 3.6-3.30 above. The majority of the Supreme

[125] [1977] VR 430, 444.

[126] *Criminal Law* (2nd ed, 1990) pp 603-606.

[127] [1968] 3 NSWR 155, 156.

[128] (1925) 19 Cr App R 8 (CA).

[129] *Canadian Criminal Law* (2nd ed, 1987) pp 184-187.

[130] Section 217 provides that culpable homicide that is not murder or infanticide is manslaughter.

Court in *O'Grady v Sparling*[131] held that criminal negligence requires advertent rather than inadvertent negligence, recklessness being more than a degree of negligence. However, in the view of Canadian commentators, there was an overwhelming tendency for lower courts in Canada to rely on an objective concept of inadvertent negligence in flat contravention to the specific ruling in *O'Grady*. The earlier decisions, for example *Titchner*,[132] invoked English manslaughter precedents such as *Bateman* or *Andrews* which required gross *inadvertent* negligence.

3.87 A more recent decision of the Supreme Court of Canada, *LeBlanc*,[133] was inconclusive on this point. The accused, a bush pilot, had been charged with criminal negligence causing death, contrary to section 203 of the Criminal Code. He was making a low dive in an effort to frighten two people on the ground when, because of a miscalculated turn, he struck and killed one of them. At issue was some similar fact evidence which was admissible only if mens rea was an element of the offence. The dissenting judge, Dickson J, cited a dictum from *Arthurs*[134] that "subjective intent is not a necessary ingredient of criminal negligence". For the majority, de Grandpré J also quoted a similar remark from *Arthurs* and also an early 1929 Supreme Court of Canada dictum,[135] in which criminal negligence was defined in the specifically objective terms of "a want of ordinary care in circumstances in which persons of ordinary habits of mind would recognise that such want of care is not unlikely to imperil human life". However, he then repeated the advertence ruling of *O'Grady*, concluding that the offence required mens rea.

3.88 In a series of recent decisions[136] the Ontario Court of Appeal discussed the position following *LeBlanc*. It decided that where in cases involving an act of commission criminal negligence in Canada requires a gross departure from the objective norm, but that criminal negligence grounded on an omission has as a necessary component a subjective requirement of an actual awareness of a risk.

3.89 It is of interest that the American Model Penal Code limits the offence of manslaughter to cases of conscious risk taking, described as recklessness, and penalises inadvertent risk taking causing death by way of a quite separate offence, criminally negligent homicide. The definition of criminal negligence is similar to that in *Bateman*, requiring negligence of a greater degree than that required in civil cases.

[131] [1960] SCR 804.

[132] (1961) 131 CCC 64.

[133] (1976) 29 CCC (2d) 97.

[134] *Arthurs* (1972) 7 CCC (2d) 438, 453.

[135] *Baker* [1929] SCR 354, 358.

[136] The most recent being *Waite* (1986) 52 CR (3d) 355.

3.90 The commentary[137] to the Model Penal Code summarises the position before the Code was drafted as follows:

> [T]he Model Code was drafted against a background of inconsistency and imprecision in determining the content of negligence for purposes of criminal homicide. There was also a general failure to focus upon the need for a grading differential between conduct involving conscious risk creation and conduct involving inadvertence. The most common situation was that negligent homicide was treated as a species of involuntary manslaughter, with judicial formulation of the appropriate standard expressed in a jumble of language that obscured the essential character of the inquiry.

The great majority of jurisdictions have closely followed the Model Penal Code's definition of negligence.[138] There are, however, several different types of statute. Most modern revisions cover negligent homicide in a separate negligent or vehicular homicide statute,[139] although some do so with specific attention to the types of situations that are regarded as justifying penal treatment.[140] Some of the newly revised codes, for their part, treat negligent homicide as a form of manslaughter.[141]

A distinction between recklessness and negligence based on the seriousness of the harm risked

3.91 This necessarily somewhat lengthy review of the case-law suggests that, at least until the case of *Seymour*,[142] the law continued to be based on *Andrews v DPP*:[143] recklessness was best regarded as a category of gross negligence, but courts were divided as to the precise meaning that could be given to the word "recklessness".

[137] American Law Institute, *Model Penal Code and Commentaries* (1980), Part II, p 85.

[138] Notable exceptions are Fla § 782.07; La § 14:32; Minn § 609.205; N.M § 40A-2-3; Ohio § 22-16-20; Wis § 940.06.

[139] Ala § 13A-6-4; Ariz § 13-1102; Ark § 41-1505; Colo § 18-3-105; Conn §§ 53a-57,-58; Del tit 11, § 631; Haw §§ 707-703, -704; Kan § 21-3405; Ky § 507.050 (termed recklessness but defined closer to MPC negligence); La § 14:32; Ne tit 17A § 205; Mont § 94-5-104; NH § 630:3; NJ § 2C:11-5; NY § 125.10; ND § 12.1-16-03; Ore § 163.145; Tex § 19.-07. Several proposals also have separate provisions. Cal (p) S.B. 27, § 7005; Mass (p) ch.265, § 5; Mich (p) § 2005; Okla (p) § 2-205; SC (p) § 15.03; Tenn (p) § 39-1104; Vt (p) § 2.6.4; WVa (p) § 61-505.

[140] Minn §§ 609.205,.21 (hunting accidents, spring gun, vicious animals, and vehicular homicide); Ohio § 2903.05 (deadly weapon or dangerous instrumentality); Wis § 940.07 to.09 (vicious animal, vehicle or weapon, intoxicated user of vehicle, or firearm).

[141] Fla § 782.07; NM § 40A-2-3; Pa tit 18 § 4005; SD § 22-16-20; Wash § 9A.32.070.

[142] [1983] 2 AC 493.

[143] [1937] AC 576.

3.92 Some commentators, however, for example Smith and Hogan in the fifth edition of their *Criminal Law*,[144] argued that, in addition to unlawful act manslaughter, there were two distinct types of manslaughter based on the following fault terms:

> 2) An intention to do an act, or to omit to act where there is a duty to do so,[145] being grossly negligent whether death, or serious injury be caused.
>
> 3) An intention to do an act, or to omit to act where there is a duty to do so, being reckless whether death, or personal injury, or possibly, any injury to "health or welfare",[146] be caused.[147]

Elsewhere in the text it is clear that Smith and Hogan used the word "recklessness" to denote conscious risk-taking, all inadvertent risk-taking constituting negligence.[148] It can be seen that a distinction was drawn between conscious risk-taking where the defendant's conduct risked causing death, personal injury or possibly injury to health and welfare (although death was in fact caused); and inadvertent risk-taking where the defendant's conduct risked causing death or serious injury (but nothing less than that).

3.93 Does the case-law support such an approach? The cases which perhaps most clearly adopted a subjective test of recklessness, *Pike*[149] and *Smith*,[150] required a risk only of *some harm*, while *Bateman*,[151] which laid down an objective test of gross negligence, required *danger to life and safety*.

3.94 However, not all the cases give support to anything like so clear a distinction. For example, *Church*,[152] which appears to give backing for the view that the defendant's perception of risk was relevant, required that the risk be one of "danger to life and limb", and in *Cato*[153] it was held that the defendant's lack of knowledge that heroin could cause death or serious injury was a relevant consideration, thereby combining a subjective test of recklessness with the requirement that the risk be one of death or serious injury.

[144] (1985), p 311.

[145] In *Stone and Dobinson* [1977] QB 354...an omission to care for P, to whom a duty was owed, was the foundation of liability. (Foot-note in original).

[146] *Stone and Dobinson*, supra (foot-note in original).

[147] Smith and Hogan *Criminal Law* (5th ed, 1985), p 312. The first type of mens rea, omitted from this extract, was intention to do an act which was unlawful and dangerous.

[148] *Ibid*, p 319.

[149] [1961] Crim LR 547.

[150] [1979] Crim LR 251: see paras 3.78 and 3.81 above.

[151] (1925) 19 Cr App R 8.

[152] [1966] 1 QB 59.

[153] [1976] 1 WLR 110.

3.95 Problems with this distinction are also caused by the ambiguous nature of words such as "disregard" and the possibility of indifference as a distinct fault term. For example, in *Gray v Barr* Salmon LJ said, obiter, that it was manslaughter

> ...[t]o do a lawful act which is dangerous with a reckless disregard whether or not it injures another... .[154]

If the assumption made by Smith and Hogan[155] that "recklessness" in all cases before *Caldwell*[156] was used in a subjective sense is correct, this dictum supported their theory. However, it has been seen that the case-law did not altogether support this assumption and that "disregard" did not necessarily imply awareness of risk.

3.96 A similar problem occurred in *Stone and Dobinson*[157] when the Court of Appeal held that in order to convict of manslaughter the jury must feel convinced that the defendants' conduct exhibited

> ...a reckless disregard of danger to the health and welfare of the infirm person.[158]

3.97 However, although examination of the case-law does not give unequivocal support to Smith and Hogan's distinction, the demands of logic require that before 1985 conscious risk-taking as a basis of manslaughter must have related to a risk of harm short of death or serious injury. That is because, before *Moloney*[159] was decided in that year, consciously creating a risk of death or serious injury fell within the more serious offence of murder.[160]

3.98 In conclusion, therefore, the following account is suggested by way of explanation of the authorities as they stood in 1983. Recklessness, a category of gross negligence, could involve either awareness of risk, or indifference towards it. In those cases where the defendant was shown to have been aware of the risk, that risk had to be one of harm short of serious injury or death, because if the defendant could be proved to have been aware that his conduct risked causing those harms he would have been guilty of murder. If the defendant could not be proved to have been aware of the risk created by his conduct, but was instead shown to have been indifferent or in some other way grossly negligent, it was not clear whether the law required the risk had to be one of causing

[154] [1971] 2 QB 554, 576H-577A.

[155] *Criminal Law* (5th ed, 1985) p 319.

[156] [1982] AC 341.

[157] [1977] QB 354.

[158] [1977] QB 354, 363F.

[159] [1985] AC 905.

[160] See paras 3.168-3.170 below.

death or serious injury, or whether running a risk of causing less serious harm would suffice for manslaughter.

E. *Caldwell* recklessness: *R v Seymour*

3.99 In two decisions, *Caldwell*[161] and *Lawrence*,[162] delivered on the same day in 1981, the House of Lords brought about a radical reappraisal of the meaning of the word "recklessly" when it appeared without a statutory definition in two recent statutes, the Criminal Damage Act 1971 and the Road Traffic Act 1972. These two decisions were followed two years later by a further House of Lords decision, *Seymour*,[163] which had a particular bearing on the meaning of recklessness in the context of the law of manslaughter, whose earlier history we traced at paragraphs 3.59-3.82 above.

3.100 In *Caldwell* the majority of the House of Lords concluded that the adjective "reckless", when used in a criminal statute, had not acquired a special meaning or become a term of art, in contrast to the word "malicious" in the Malicious Damage Act 1861. Case-law on the meaning of the word "malicious" had therefore no bearing on the meaning of the adjective "reckless" in section 1 of the Criminal Damage Act 1971. Lord Ackner described the new position like this in his judgment in *Reid*:[164]

> ..."reckless" accordingly bore its popular or dictionary meaning of careless, regardless, or heedless of the possible harmful consequences of one's act.[165]

3.101 In *Caldwell* Lord Diplock gave his famous definition of "recklessness" in relation to the Criminal Damage Act 1971:

> In my opinion, a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is "reckless as to whether any such property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.[166]

This definition was approved by the majority of the House of Lords in that case.

[161] [1982] AC 341.

[162] [1982] AC 510.

[163] [1983] 2 AC 493.

[164] [1992] 1 WLR 793.

[165] [1992] 1 WLR 793, 803C.

[166] [1982] AC 341, 354F.

3.102 On the same day, in *Lawrence*,[167] the House of Lords unanimously applied the *Caldwell* test of recklessness to the offence of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972; Lord Diplock, speaking for the House, suggested a model direction for a jury in such a case.[168]

3.103 *Seymour*[169] concerned the extent to which the Diplock formulation of recklessness should apply to the offence of motor manslaughter, which is an instance of gross negligence manslaughter. Lord Roskill referred to the decision of the House of Lords in an extradition case, *Government of the United States of America v Jennings*,[170] where it was held that the common law offence of motor manslaughter had not been impliedly repealed by the corresponding statutory offence of causing death by reckless driving;[171] and that the ingredients of manslaughter and causing death by reckless driving were identical.[172] For this reason, Lord Roskill approved the trial judge's direction, which had been derived from *Lawrence*:

> [This] admirably clear direction not only properly reflected the decision of this House in *Lawrence* but also Lord Atkin's speech in *Andrews* [1937] AC 576.[173]

3.104 This simple rule, that the "*Caldwell*" test for recklessness applied in all cases of manslaughter, at first sight seemed to be undermined by dicta in the same case from Lord Fraser of Tullybelton[174] and Lord Roskill himself,[175] which appeared to suggest that the degree of recklessness required for manslaughter was higher than that required for the statutory offence. However, in *Kong Cheuk Kwan v The Queen*,[176] Lord Roskill denied that there was any inconsistency, and said that he had intended his words in *Seymour* to act only as guidance to prosecutors as to whether to *charge* the offence of manslaughter

[167] [1982] AC 510.

[168] [1982] AC 510, 526G-527B.

[169] [1983] 2 AC 493.

[170] [1983] 1 AC 624.

[171] This offence was created by the Road Traffic Act 1972, s 1(1), as amended by the Criminal Law Act 1977, s 50. This offence has since been abolished by s 1 of the Road Traffic Act 1991, see para 3.127 below.

[172] Although Lord Roskill noted that he had added in *Jennings* [1983] 1 AC 624, 644B, cited at [1983] 2 AC 493, 503G:

> No doubt the prosecuting authorities today would only prosecute for manslaughter in the case of death caused by the reckless driving of a motor vehicle on a road in a very grave case.

[173] [1983] 2 AC 493, 504C-D.

[174] *Ibid*, p 500D.

[175] *Ibid*, p 508C: "in order to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high".

[176] (1985) 82 Cr App R 18, 25.

(defined, as in *Caldwell*, in terms of an obvious and serious risk of some damage) or the statutory offence of causing death by reckless driving.

A comparison between Seymour *and* Andrews

3.105 *Seymour* and *Kong Cheuk Kwan* changed the situation radically. *Caldwell* recklessness, as applied to the law of manslaughter through *Seymour*,[177] imposed a quite different, and much wider, test than *Andrews*, although Lord Roskill in *Seymour* had professed that he was following *Andrews*. Under the *Seymour* rule, once the defendant had been shown by his conduct to have created an obvious and serious risk of causing physical injury to some other person, it was open to the jury to find him guilty of manslaughter whether his conduct was a result of "mere inadvertence", subjective recklessness or poor judgment. It was no longer open to a defendant to dispute guilt on the ground that the negligence was not "gross", or on the ground that he himself was not aware of the risk created by his conduct.

3.106 Paradoxically, however, the *Seymour* test was in some other respects *narrower* than the *Andrews* test of gross negligence manslaughter. First, it was confined to those situations where the defendant *through his own conduct* created an obvious and serious risk of causing physical harm to some person. It could not therefore be applied in cases of manslaughter by omission, or in cases, such as some medical negligence cases, where the defendant was at fault in reacting inappropriately to a pre-existing danger.

3.107 This limitation was noted by Lord Roskill in the Privy Council case of *Kong Cheuk Kwan*[178] when he said:

> Lord Diplock was speaking of an obvious and serious risk of causing physical injury created by the defendant. He was not there concerned to deal with cases where the conduct complained of was of a defendant's reaction or lack of reaction to such a risk created by another person.[179]

3.108 This is a problematic distinction because it is frequently difficult to distinguish between cases of omission and of commission. For example, if the driver of a car hits a pedestrian who is crossing the road, is the fault involved best described as the driver's *failure* to swerve in time or to keep a proper look out, or as his *positive act* of dangerous driving?[180]

3.109 The second way in which the *Seymour* formula of reckless manslaughter was narrower than the *Andrews* test of gross negligence was that it incorporated what has now become

[177] [1983] 2 AC 493.

[178] (1985) 82 Cr App R 18.

[179] (1985) 82 Cr App R 18, 25.

[180] This problem is considered further at paras 3.130-3.140 below.

known as the "*Caldwell* lacuna". By this lacuna in the law a defendant who realised there was a risk but believed he had done enough to neutralise it would escape conviction. The existence of this lacuna was recognised recently by Lord Goff in the House of Lords in *Reid*.[181] It is interesting that in *Andrews* Lord Atkin seemed to have foreseen the lacuna and to have thought it provided no answer to a charge of manslaughter. He said in that case that there was an alternative form of mens rea which would be sufficient to create liability:

> ...the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.[182]

Kong Cheuk Kwan

3.110 The case of *Kong Cheuk Kwan*,[183] which was concerned with a collision between two hydrofoils, appeared to have raised the difficulty we have just noted. The Privy Council, however, did not consider this point and instead applied the *Seymour* test of recklessness.

3.111 Lord Roskill reviewed *Caldwell*, *Lawrence* and *Seymour*, and held that:

> Their Lordships are of the view that the present state of the relevant law in England and Wales and thus in Hong Kong is clear. The model direction suggested in *Lawrence* and held in *Seymour* equally applicable to cases of motor manslaughter requires first, proof that the vehicle was in fact being driven in such a manner as to create an obvious and serious risk of causing physical injury to another and second, that the defendant so drove either without having given any thought to the possibility of there being such a risk or having recognised that there was such a risk nevertheless took it... .[184]

3.112 He then made reference to *Andrews v DPP*, taking the view that in that case, although Lord Atkin did not disapprove of what was said in *Bateman*:

> ...he clearly thought...that it was better to use the word "reckless" rather than to add to the word "negligence" various possible vituperative epithets. Their Lordships respectfully agree... . The *Lawrence* direction on recklessness is comprehensive and of general application to all offences, including manslaughter involving the driving of motor vehicles recklessly and should be given to juries without in any way being diluted. Whether a driver at a material time was conscious of the risk he was running or gave

[181] [1992] 1 WLR 793, 813: see paras 3.119-3.120 below.

[182] [1937] AC 576, 583.

[183] (1985) 82 Cr App R 18.

[184] (1985) 82 Cr App R 18, 25.

> no thought to its existence, is a matter which affects punishment for which purposes the judge will have to decide, if he can, giving the benefit of the doubt to the convicted person, in which state of mind that person had driven at the material time.[185]

The case-law between Kong Cheuk Kwan *and* Reid

3.113 Despite this guidance, however, the law as it had been understood before 1983 remained stubbornly persistent. In *West London Coroner, ex parte Gray*,[186] for example, the Divisional Court applied a test based on *Stone and Dobinson*.[187] The court had to consider a coroner's direction to the jury on unlawful killing, a verdict equivalent to manslaughter. The deceased, who had taken a large quantity of alcohol and some cannabis and amphetamine, had been arrested by police officers and put in a cell where he choked on his own vomit. Watkins LJ criticised the coroner's direction because it may have led the jury to believe that they could aggregate the conduct of two or more of the officers to produce a combined picture of unlawful conduct or neglect. He then suggested a form of direction which should have been given to the jury, which appeared to be based on *Stone and Dobinson*:

> It should be explained that to act recklessly means that there was an obvious and serious risk to the health and welfare of Mikkelsen to which that police officer, having regard to his duty, was indifferent or, recognising that risk to be present, he deliberately chose to run the risk by doing nothing about it. It should be emphasised, however, that a failure to appreciate that there was such a risk would not by itself be sufficient to amount to recklessness.[188]

3.114 An explanation of this decision may be found in the fact that the conduct complained of was the defendant's omission,[189] although the court never explicitly said that this was the reason *Seymour* was not applied.

3.115 In *Goodfellow*[190] the defendant had caused the death of his wife and two of his children by setting fire to his council house in an attempt to persuade the council to rehouse them. The Court of Appeal said:

> It seems to us that this was a case which was capable of falling within either or both types of manslaughter [unlawful act and reckless or gross negligence

[185] (1985) 82 Cr App R 18, 26.

[186] [1988] QB 467.

[187] [1977] QB 354 AC.

[188] [1988] QB 467, 477A-B.

[189] See paras 3.11-3.18 above for a discussion of the law relating to omissions prior to *Seymour*.

[190] (1986) 83 Cr App R 23. The court included Lord Lane CJ and Taylor J.

> manslaughter]. On the *Lawrence* aspect, the jury might well have been satisfied that the appellant was acting in such a manner as to create an obvious and serious risk of causing physical injury to some person, and secondly that he, having recognised that there was some risk involved, had nevertheless gone on to take it.[191]

3.116 This clearly follows the *Caldwell/Lawrence* test. However, the court specifically equated recklessness with gross negligence, in spite of Lord Roskill's assertion in *Kong Cheuk Kwan*, cited in paragraph 3.112 above, that talk of "negligence" was incorrect. It said:

> Lord Roskill pointed out in *Kong Cheuk Kwan v The Queen* (which was a case where death resulted from a head-on collision in bright sunshine between two hydrofoils plying between Hong Kong and Macao), that the question for the jury was whether or not the defendants had been guilty of recklessness (or gross negligence), and no question arose of death resulting from an unlawful act of violence.[192]

3.117 Some difficulty was also caused by some obiter dicta of the Court of Appeal in *Ball*.[193] This case was primarily concerned with unlawful act manslaughter, but the court is reported as having summarised the law relating to death caused by lawful acts in terms based on *Bateman*[194] without any reference to *Lawrence*[195] or *Seymour*:[196]

> In the case of a lawful act the question is whether the accused has been guilty of gross or criminal negligence in the sense that the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment.[197]

3.118 In *Madigan*,[198] however the Court of Appeal applied *Lawrence* very strictly. The court held that, in a case of reckless driving, the jury should be directed on the meaning of "recklessly" in the ipsissima verba of Lord Diplock in *Lawrence*.

[191] (1986) 83 Cr App R 23, 26.

[192] (1986) 83 Cr App R 23, 26.

[193] [1989] Crim LR 730.

[194] (1925) 19 Cr App R 8.

[195] [1982] AC 510.

[196] [1983] 2 AC 493.

[197] [1989] Crim LR 730, 732.

[198] (1982) 75 Cr App R 145. This was a case of reckless driving contrary to s 2 of the Road Traffic Act 1972 (as substituted).

R v Reid

3.119 In *Reid*[199] the House of Lords had the opportunity to return to the issue of *Caldwell* and *Lawrence* recklessness once again, in the context of offences of reckless driving,[200] The House confirmed the *Caldwell* and *Lawrence* definitions of recklessness in this context, but made some derogations from the Diplock formulation as it had previously been understood. One such concession was the recognition that in some cases the defendant's explanation of his conduct could override the presumption of recklessness which was created by the manner of his driving.[201] The House also indicated, differing from *Madigan*,[202] that it was not always necessary, and might not be desirable, to use Lord Diplock's exact words when directing the jury.[203]

3.120 It is not clear to what extent the decision in *Reid* will affect the law of manslaughter, since the discussion was limited to offences of reckless driving, and it was noted in that case that the words "reckless" and "recklessly" may bear different meanings in different contexts.[204] However, *Seymour* established that recklessness was to have the same meaning for motor manslaughter as for the statutory reckless driving offences, and so, logically, any adjustments to the meaning of the word in the statutory context should apply equally to manslaughter. The extent to which *Seymour*, as modified by the decision in *Reid*, still represents the law of manslaughter was discussed by the Court of Appeal in *Prentice*, and we will now turn to this important case.

F. *R v Prentice*

The judgment of the Court of Appeal

3.121 *Prentice*[205] provided an occasion for reviewing two questions of almost equal difficulty. First, had *Seymour* effectively replaced the earlier law on the topic as the sole source of the law of "reckless" manslaughter? Secondly, if *Seymour* did not have that radical effect, what had been the terms of that previous law, and what were its terms now? These are the fundamental problems which lie below the simple statement of the issues at the start of the judgment in *Prentice*:[206] what is the true legal basis of involuntary manslaughter by breach of duty?

[199] [1992] 1 WLR 793.

[200] These were offences contrary to ss 1 and 2 of the Road Traffic Act 1972 (as substituted).

[201] [1992] 1 WLR 793, per Lord Ackner at p 806A-E; Lord Goff at p 813B-D.

[202] See para 3.118 above.

[203] [1992] 1 WLR 793, per Lord Goff at pp 813G-H and 816C-G.

[204] [1992] 1 WLR 793, Lord Ackner at p 805G-H, Lord Goff at p 807C-D.

[205] [1993] 3 WLR 927.

[206] *Ibid*, p 932C. The court also referred to the general question posed in *Archbold* (44th ed, 1992, vol 2), at paras 19-97: "has gross negligence manslaughter survived *Caldwell* and *Lawrence*?"

3.122 Three appeals against conviction for manslaughter were considered together. Two of these cases involved doctors administering treatment in hospitals. The other was concerned with an electrician wiring up a central heating system.

3.123 The court first referred to a line of authority from *Doherty*,[207] a medical case in which a distinction was drawn between the degree of negligence required for criminal as opposed to civil negligence, through to *Bateman*[208] to *Andrews*.[209] In all the cases gross negligence was identified as the basis for guilt in manslaughter.

3.124 Lord Taylor CJ noted that in *Andrews* Lord Atkin had said that "recklessness" was probably the best way of expressing gross negligence, although he had also observed that:

> ..."reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction.[210]

Lord Taylor commented that Lord Atkin had introduced the word "reckless" to denote the degree of recklessness required, whilst recognising that it could not be an exhaustive description, and that there was still scope for manslaughter by a high degree of negligence in the absence of indifference. Lord Atkin had excluded "mere inadvertence",[211] but by this remark he had simply meant that the inadvertence must be grossly negligent. He did not exclude all inadvertence, since he later spoke of "criminal disregard" as founding criminal culpability, and had given as examples "the grossest ignorance or the most criminal inattention".

3.125 Lord Taylor then turned to consider the two-limbed test of recklessness in *Stone and Dobinson*,[212] for which *Andrews* was cited as authority. He concluded that, at least until 1977, the appropriate test was gross negligence:

> ...the quest was for the appropriate definition of the requisite degree of negligence. [213]

3.126 He then passed to the 1981 cases of *Caldwell*[214] and *Lawrence*.[215] He specifically

[207] (1887) 16 Cox CC 306.

[208] (1925) 19 Cr App R 8, 11: see paras 3.4-3.5 above.

[209] [1937] AC 576: see paras 3.36-3.37 above.

[210] [1937] AC 576, 583.

[211] *Ibid*, p 582.

[212] [1977] QB 354.

[213] [1993] 3 WLR 927, 934B.

[214] [1982] AC 341.

noted that the wide Diplock meaning of recklessness in the statutory contexts of the Criminal Damage Act 1971 and section 1 of the Road Traffic Act 1972 had survived all attacks on it, most recently in *Reid*.[216] It had, however, survived unscathed only in those *statutory* contexts. In Lord Taylor's view, the very passages in *Reid* which supported the Diplock definition as epitomising the law[217] showed clearly the difficulty which that wide definition had caused:

> ...perhaps because the first impression of the ordinary lawyer and the ordinary juror would incline to a more restricted meaning of the word. It is beyond doubt that, at least since 1982, the word "reckless" has caused the courts problems in regard to involuntary manslaughter which would not have occurred had the focus been on gross negligence rather than on recklessness.[218]

3.127 Lord Taylor then passed on to *Seymour*[219] in which, it will be recalled, the House of Lords decided that the ingredients of the two offences of causing death by reckless driving and motor manslaughter were the same. He said that the court was persuaded that Lord Roskill's statement in *Seymour* that:

> ..."reckless" should today be given the same meaning in relation to all offences which involve "recklessness" as one of the elements unless Parliament has otherwise ordained

was obiter and should not be followed in the class of manslaughter involved in the cases before it.[220] On the other hand, even if it had wished to do so, the court was unable to over-rule the actual decision in *Seymour*. It follows that although the offence of causing death by reckless driving which formed the basis of that decision was abolished by section 1 of the Road Traffic Act 1991, the *Seymour* definition of motor manslaughter remained unimpaired.[221]

[215] [1982] AC 510.

[216] [1992] 1 WLR 793.

[217] Per Lord Keith (795E-796D), Lord Ackner (801C-805H), Lord Goff (807D-812D) and Lord Browne-Wilkinson (818F-820A).

[218] [1993] 3 WLR 927, 934E-F.

[219] [1983] 2 AC 493.

[220] [1993] 3 WLR 927, 935E.

[221] As Lord Taylor commented, "To this extent the hopes expressed by Lord Goff in *Reid* [1992] 1 WLR 793, 814A that 'we will no longer be troubled by the meaning of the word recklessly in this context' may not be realised": [1993] 3 WLR 927, 935F.

3.128 Lord Taylor also mentioned some points which were raised by the case of *Reid*.[222] The Diplock approach to recklessness had been modified in that case since their Lordships had held that it was not necessary to use his ipsissima verba, and that the formula should not be regarded as of universal application but should be adapted to fit the facts of a particular case.[223] Moreover, each of the four Law Lords who gave full speeches referred to the need for a court to take account of any excuses or explanations put forward on behalf of the defendant.[224]

3.129 This review of the case-law led Lord Taylor to accept that the law was now characterised by conflicting approaches and uncertainty.[225] He observed that neither *Andrews* nor *Stone and Dobinson* had ever been overruled, and that the modifying effects of the speeches in *Reid*, and particularly the emphasis on the need to take the defendant's excuses into account, brought the *Lawrence/Caldwell* approach closer to the *Andrews* gross negligence test.

3.130 It was however a basic premise of Lord Diplock's formulation that the defendant had *himself created* an obvious and serious risk.[226] Cases of this type were in Lord Taylor's view different from breach of duty cases. He took as examples medical cases where there was frequently a high risk of danger to the deceased's health which was not created by the defendant, who only assumed a "duty" in response to this pre-existing risk to the patient's health.

3.131 Such cases could also be distinguished from those contemplated by Lord Diplock in *Caldwell* and *Lawrence* because the "obvious risk" in his formulation meant obvious to "the ordinary prudent individual",

> ...[b]ut in expert fields where duty is undertaken, be it by a doctor or an electrician, the criteria of what the ordinary prudent individual would appreciate can hardly be applied in the same way.[227]

3.132 Lord Taylor then referred to the "*Caldwell* lacuna".[228] He said that the defendant who recognised the existence of a risk and took steps to deal with it in a grossly negligent way

[222] [1992] 1 WLR 793.

[223] Per Lord Keith of Kinkel at 796D, Lord Ackner at 805G-H, Lord Goff at 813G-H and Lord Browne-Wilkinson at 819H-820A.

[224] *Ibid*, pp 796D, 806B, 813E and 819G.

[225] "Is the mens rea of the offence to be characterised as gross negligence or as *Lawrence/Caldwell* recklessness as modified by *Reid*? Some judges have sought to combine the two, or put a dash of one with a preponderance of the other": [1993] 3 WLR 927, 936B.

[226] *Ibid*, p 936E.

[227] *Ibid*, p 936G-H.

[228] See para 3.109 above.

would fall outside the *Lawrence* definition of recklessness, but might be caught by Lord Atkin's test of gross negligence.

3.133 Therefore:

> It seems to us that the application of the *Lawrence* test to motor manslaughter by the House of Lords in *Seymour* came about for historical reasons flowing from the co-existence of the common law and statutory offences. Unless and until the House of Lords, or Parliament, reverses *Seymour*, the *Lawrence* test must apply in motor manslaughter, notwithstanding the abolition of the statutory offence which gave birth to it. The House of Lords is unlikely to reverse it since the appeal in *Reid* was an express attempt to upset *Lawrence* and it failed.
>
> Leaving motor manslaughter aside, however, in our judgment the proper test in manslaughter cases based on breach of duty is the gross negligence test established in *Andrews* and *Stone and Dobinson*... .[229]

"Breach of duty" in Prentice

3.134 Unfortunately, it is not entirely clear whether, by his reference to "involuntary manslaughter based on breach of duty", the Lord Chief Justice intended to limit this ruling to a particular class of case, within the general observation that:

> The range of possible duties, breaches and surrounding circumstances is so varied that it is not possible to prescribe a standard jury direction appropriate in all cases.[230]

3.135 It is certain that he intended the class of case described at paragraphs 3.19-3.21 above, involving experts, should fall within the category of "breach of duty" cases to which *Prentice* should apply. It is probable that cases of omission (see paragraphs 3.11-3.18 above) also fall within this category, since they undoubtedly involve "breach of duty", albeit of a particular sort. This view is supported by the Divisional Court's application of a gross negligence test in *West London Coroner ex parte Gray*.[231]

3.136 However, the extent to which the category "manslaughter cases based on breach of duty" includes other cases of involuntary manslaughter is unclear. In the extract quoted at paragraph 3.133 above, although Lord Taylor said that the *Andrews* test could not apply to cases of motor manslaughter, he nevertheless appeared to include motor manslaughter within the category of "manslaughter cases based on breach of duty". Driving a car, however, does not ordinarily impose any duty on the driver over and above the duty

[229] *Ibid*, pp 936H-937B.

[230] *Ibid*, p 937D

[231] See paras 3.113-3.114 above.

owed by everyone not to endanger others by their acts. Although the borderline between omissions and positive acts is often difficult to distinguish,[232] motor manslaughter cannot properly be said to fall within one of the specific categories of "duty cases" described at paragraphs 3.11-3.18 and 3.19-3.22 above.

3.137 It might be thought that such speculation about motor manslaughter is of academic interest only, since Lord Taylor made it clear that because of the decisions in *Seymour* and *Reid* the gross negligence test could not apply to driving cases. However the ambiguity we have noted is, perhaps, of more practical concern since it raises a general uncertainty about the meaning of the expression "manslaughter cases based on breach of duty". If motor manslaughter falls within this category, what other types of case are also included within it?[233]

3.138 The resolution of this uncertainty is made the more difficult because the main reason which Lord Taylor gave for distinguishing "breach of duty" cases from those which Lord Diplock had in mind when he formulated his test of recklessness was irrelevant to the facts of the cases on appeal. He said in this context:

> ...it is a basic premise of Lord Diplock's formulation that the defendant himself created the obvious and serious risk... . But, breach of duty cases such as those involving doctors are different in character. Often there is a high risk of danger to the deceased's health, not created by the defendant, and pre-existing risk to the patient's health is what causes the defendant to assume the duty of care with consent.[234]

However, the facts of the case of Drs Prentice and Sullman[235] did not clearly indicate the existence of any pre-existing risk to the patient. This feature was even more apparent in the case against the electrician, Holloway, who did his job by connecting part of the central heating system in the deceased's house to earth, with the result that metal work in the house became live when the heating system was turned on.

3.139 For these reasons, the decision in *Prentice* did not leave it wholly clear whether the *Lawrence* formulation should still apply to cases where the defendant created the risk by his positive act. *Seymour* could possibly be limited to motor manslaughter cases, since the court in *Prentice* found that Lord Roskill's imposition of the same definition of recklessness on all offences in whose definition the word was included was obiter.[236]

[232] See the discussion in para 3.108 above,

[233] This uncertainty about the meaning of "duty" in relation to motor manslaughter originated in *Andrews*: see para 3.23 above.

[234] [1993] 3 WLR 927, 936F.

[235] See paras 3.145-3.146 below.

[236] See para 3.127 above.

This appears to have been the court's intention in *Prentice*, since Lord Taylor at one point said specifically that the court considered its approach, summarised in paragraph 3.140 below, to be "the correct one in all cases of involuntary manslaughter, except for motor manslaughter".[237] This dictum however is difficult to reconcile with *Kong Cheuk Kwan* and *Goodfellow* in which the Privy Council and the Court of Appeal respectively had applied the *Lawrence* test without qualification, in cases other than motor manslaughter.

Prentice: *a summation*

3.140 The court in *Prentice* listed[238] the ingredients which have to be proved for a conviction of involuntary manslaughter by breach of duty in the same terms as the elements of the *Bateman* formulation set out at paragraph 3.5 above. As to the element of "gross negligence", Lord Taylor said:

> [W]ithout purporting to give an exhaustive definition, we consider proof of any of the following states of mind in the defendant may properly lead a jury to make a finding of gross negligence:
>
> (a) indifference to an obvious risk of injury to health.
>
> (b) actual foresight of the risk coupled with the determination nevertheless to run it.
>
> (c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction.
>
> (d) inattention or failure to advert to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the defendant's duty demanded he should address.
>
> We have borne in mind the dicta of the Court of Appeal in *Seymour*[239] and in *Kong Cheuk Kwan v The Queen*.[240] They were to the effect that the word "reckless" was to be preferred to the word "negligence" with whatever epithet. However, in view of the different tests and meanings which have in various contexts been attached to "reckless" and "recklessness" we think it

[237] [1993] 3 WLR 927, 947C.

[238] *Ibid*, p 937C.

[239] (1983) 76 Cr App R 211, 216 (CA).

[240] (1985) 82 Cr App R 18, 26.

preferable to avoid those words when directing juries as to involuntary manslaughter by breach of duty.[241]

Prentice *and the general law of manslaughter*

3.141 The last part of the passage just quoted is very striking. The observations in *Seymour* and *Kong Cheuk Kwan* were indeed technically obiter dicta. However, they did represent the considered view, in one case of a unanimous House of Lords, and in the other case of the Privy Council, that liability for involuntary manslaughter should be identified in terms of recklessness and not of gross negligence. Only seven years later, the Court of Appeal had nonetheless found itself constrained to reject this formulation as the basis for directions to juries, and to revert to the language of gross negligence. This volte face, involving a very substantial difference of opinion between the three most influential courts in our system of criminal justice, demonstrates if nothing else the difficulty, or impossibility, of conveying the substance of the law by a single phrase, or by a formula which uses only general and undefined concepts.

3.142 As we have seen, the court in *Prentice* did not regard "gross negligence" as representing any such formula, as opposed to being merely a labelling or summarising expression, to be explicated by reference to a series of different possible grounds of liability, examples of which we set out in the passage cited in paragraph 3.140 above. In so doing, it was at pains to point out that there could be no standard jury direction in cases of this type, and that the account of gross negligence which it was providing was not intended to be exhaustive. It is unfortunate that even this account contained ambiguities which may cause problems in future cases.

3.143 First, proof of "indifference to an obvious risk of injury to health" might allow a jury to find gross negligence, but "indifference" is almost as uncertain in its meaning as "recklessness".[242] The meaning of the word "obvious" in this phrase is also unclear. The court itself had elsewhere[243] drawn attention to the fact that the word "obvious" in the Diplock formulation was inappropriate when applied to an expert, but in the present context it is not completely clear whether the court intended that the risk be obvious to an ordinary person or obvious to a person with similar qualifications to the defendant. We believe that the latter is the better view.[244] The uncertain meaning of the word "obvious" is also relevant to the fourth limb of the definition, which calls for "inattention or failure to advert to a serious risk which goes beyond mere inadvertence in respect of an obvious and important matter which the defendant's duty demanded he should address".

[241] [1993] 3 WLR 927, 937D-G.

[242] See paras 3.69-3.76 above.

[243] [1993] 3 WLR 927, 936G-H.

[244] This conclusion seems to follow from the court's handling of the case of Holloway: see paras 3.151-3.153 below.

3.144 And secondly, the court speaks, in example (a) of risk of (*semble*, any) injury, and later on simply of "risk". This prompts the question: risk of *what*?, and the fear that a very low standard of liability is being created.

The practical application of the new law

3.145 Turning to the actual cases considered in *Prentice*, however, it becomes clear that the judgment of the court was a long way away from laying down a comprehensive scheme for the whole of the law of reckless manslaughter. In the first case, Dr Prentice, a pre-registration housemen, was called upon to treat a leukaemia patient, Malcolm Savage, who had been receiving a course of cytotoxic drugs intravenously and by lumbar puncture under the care of a consultant. On the day in question there was no-one more senior to administer the treatment and the registrar therefore asked Dr Prentice to do it. Dr Prentice was reluctant to do so because he had only limited experience of cytotoxic drugs and had never successfully administered a lumbar puncture. The registrar told him to ask Dr Sullman to supervise, and Dr Sullman agreed to do so. Dr Sullman had some limited previous experience of cytoxic drugs; his one previous attempt to do a lumbar puncture had failed. Unfortunately, an important misunderstanding took place. Dr Sullman thought that he had only been asked to supervise the lumbar puncture itself, whereas Dr Prentice believed he was supervising the entire administration of the drugs. Dr Prentice inserted the lumbar puncture needle into the spine and then asked for the syringe containing the drug to be passed to him. Dr Sullman opened the box on the drugs trolley which contained syringes containing two different types of cytotoxic drug. One of these, vincristine, was usually administered to the patient intravenously and was potentially fatal if injected into the spine. Dr Sullman, who thought that he had only been asked to supervise the lumbar puncture, picked up the syringe containing vincristine and passed it to Dr Prentice. Dr Prentice, who thought that Dr Sullman was supervising the entire process of the administration of the drug, injected the contents of the syringe into the patient's spine without first checking the label. The patient died as a result.

3.146 At the trial the prosecution case against Dr Prentice was that he ought to have known of the dangers involved in the injection into the spine of vincristine and that he ought to have checked the labels before injecting the drugs. He had given no thought to these matters, and his failure to give thought to them was reckless. The case against Dr Sullman was that he had a duty to supervise the whole operation and to ensure that the right drugs were inserted in the right place by checking the labels and making sure that Dr Prentice injected the drugs correctly. Even if he did not have a duty to supervise the whole operation he had a duty to intervene when he saw Dr Prentice was preparing to inject the patient without having checked the labels himself. On one or other of those grounds his conduct was reckless.

3.147 The judge directed the jury in terms of the *Andrews* test of gross negligence:

> You have to be satisfied that the defendant's conduct went beyond, went further than, a question of compensation between citizens, that it was in your

> view criminal conduct requiring punishment. That is the position. Recklessness would be such conduct.[245]

However, the judge went on to give a *Lawrence* direction on recklessness, which as Lord Taylor observed,

> ...left little room for a consideration of excuses or mitigating circumstances in deciding whether the necessary mens rea for manslaughter was proved.[246]

In effect the jury in this case, and in all cases where they were directed in terms of *Lawrence* recklessness, had no choice but to convict the defendants once they had come to the conclusion that they had given "no thought to the possibility of there being any such risk". It was probable therefore that these two defendants were convicted of manslaughter by "mere inadvertence".

3.148 This would have been a most undesirable outcome, as the court recognised. It would have been avoided if the jury had been invited to consider whether, granted[247] that there had been civil negligence, the doctors' conduct had been *grossly* negligent to the point of criminality, "having regard to all the excuses and mitigating circumstances in the case".[248] Since there were many such excuses and explanations for what had occurred, the jury might well have concluded, if asked the right question, that the conduct had not been grossly negligent.

3.149 The court's analysis of the case of Drs Prentice and Sullman did not make specific reference to any of the specific categories of gross negligence which it had previously identified,[249] and it is hard to fit the facts of this case into any of those verbal formulae. Instead, the court appealed, in a broad commonsense way, to a more protean general understanding of *gross* negligence as meaning a very serious and culpable version of (objectively judged) civil negligence.

3.150 In the second case, that of Dr Adomako, the jury had in fact been directed in terms of the need to prove a high degree of negligence, rather than of recklessness.[250] The court pointed out that, in view of the difficulties for a defendant inherent in the Diplock formulation of recklessness,[251] his complaint on that score was not well-founded.[252]

[245] Cited at [1993] 3 WLR 927, 941H.

[246] *Ibid*, p 942C.

[247] As the Court of Appeal accepted: *ibid*, p 942B.

[248] *Ibid*, p 942G.

[249] See para 3.140 above.

[250] See [1993] 3 WLR 927, 947F.

[251] See for instance para 3.147 above.

The jury was well justified in finding that the conduct of the appellant, an anaesthetist who had failed over a substantial period to notice a disconnection of breath to the patient which expert evidence said would have been apparent to any competent practitioner within fifteen seconds,[253] had gone beyond mere inadvertence and constituted gross negligence.[254] This conclusion was, again, expressed in terms of serious negligence, and was not specifically linked to any of the categories identified earlier in the judgment. Unlike the case of Dr Prentice, however, it would have fitted fairly easily into category (d), "failure to advert to a serious risk which goes beyond 'mere inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address".[255]

3.151 In the third case, Holloway, the defendant was an electrician who had installed the wiring for a central heating system in such a way as to cause the electricity to be transferred to metal objects in the house, such as the kitchen sink; the householder being electrocuted by such a shock. There had been previous complaints of shocks, which the defendant had investigated, but not corrected.

3.152 The court, while speaking generally of gross negligence, also said specifically that the case fell under its category (d): "it is not an 'indifference' case".[256] However, because the case had not been put to the jury in those terms, but rather in terms of the Diplock direction in *Seymour*, the conviction had to be quashed.

3.153 We have already pointed out that it is difficult to see the case of Holloway as involving "breach of duty" as opposed to the creation of a risk by a positive act.[257] Holloway's case is, however, very clear authority for the proposition that where the facts can be analysed as involving "breach of duty",[258] the *Caldwell/Seymour* test must no longer be used. In its place there stands, in effect, a composite approach. The court may *either* simply apply the basic understanding of "gross" negligence as a very culpable version of the objective negligence familiar in the law of tort; *or* it may apply a more detailed test of the types listed, for illustration only, in *Prentice*.[259] We have seen that these tests, as formulated in *Prentice*, possess difficulties of their own.[260] But this may not matter

[252] The court explains at some length, at [1993] 3 WLR 927, 947D-F, how the defendant would have been worse off if the judge had done what the then law seemed to require, and directed the jury in *Caldwell/Seymour* terms.

[253] [1993] 3 WLR 927, 946A.

[254] *Ibid*, p 948B.

[255] See para 3.140 above.

[256] [1993] 3 WLR 927, 952F.

[257] See para 3.138 above.

[258] Whatever these words may imply, for which see paras 3.134-3.139 above.

[259] See para 3.140 above.

[260] See paras 3.142-3.144 above.

at the end of the day because, as the treatment of the case of Drs Prentice and Sullman seems to indicate,[261] the court retains a general freedom to abandon any more precise analysis of that kind, and to fall back instead on the concept of gross negligence as meaning an instinctively understood category of very bad behaviour.

3.154 Leave has now been granted to the one unsuccessful appellant in *Prentice* to appeal to the House of Lords on the following point of law of general public importance:

> In cases of manslaughter by criminal negligence not involving driving but involving breach of duty is it sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *Rex v Bateman*...and *Andrews v Director of Public Prosecutions*...without reference to the test of recklessness as defined in *Reg v Lawrence*...or as adapted to the circumstances of the case?[262]

It may well be that the House of Lords will be able to iron out many of the inconsistencies and uncertainties which we have analysed in this Part of our Consultation Paper and we look forward to studying its views in due course.

3.155 *Prentice* also leaves isolated the specific category of motor manslaughter, defined by the House of Lords in terms of *Caldwell/Seymour* recklessness which were unavoidably part of the ratio decidendi and not merely dicta.[263] It will therefore be necessary to consider this category of manslaughter separately from the rest of "gross negligence" manslaughter.

G. Motor Manslaughter

3.156 We have already traced the history of manslaughter in the course of driving a motor vehicle.[264] The position after *Lawrence, Seymour* and *Kong Cheuk Kwan* was that:

> 1. Liability for manslaughter by killing while driving a motor vehicle was judged on the same basis as liability for the offence of causing death by reckless driving under section 1(1) of the Road Traffic Act 1972.
>
> 2. The test for liability was whether the defendant was driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to another person or of doing substantial damage to property; and in driving in that manner had

[261] See paras 3.145-3.149 above.

[262] *Adomako* [1994] 1 WLR 15. See para 1.23 above.

[263] See para 3.127 above.

[264] See para 3.103 above.

either given no thought to the possibility of there being any such risk, or had recognised the risk involved but had gone on to take it.[265]

3. Thus, once the defendant could be shown to have caused that obvious and serious risk, and a person had died as a result of that driving, he would be guilty whether or not he was aware of the risk, and even if the death was the result of mere inadvertence or bad judgment. There was no need to show that his negligence was "gross".

3.157 The Court of Appeal in *Prentice* consciously refused to apply this test as a statement of the law applying to manslaughter generally, whilst it acknowledged that it remained bound by it in the case of manslaughter by driving motor vehicles.[266] We have just noted[267] that in *Prentice* no comprehensive statement of the law of manslaughter generally was provided to take the place of the *Lawrence/Seymour* formulation. However it is now clear that, outside the area of motor manslaughter, "mere inadvertence", and negligence that is not "gross", will no longer suffice for conviction.[268]

3.158 It seems clear from *Prentice* that the Court of Appeal saw no merit in there being a separate, and much more severe, rule in the special case of motor manslaughter. Nor did the courts which originated what is now the "motor manslaughter" rule argue for it because of any special considerations which related to cases of death caused on the road, because they thought that the rule applied to *all* cases of manslaughter, and not specially to motor manslaughter.[269] Nevertheless, there might be thought to be policy arguments for treating motor manslaughter differently from other unintentional killing, however much the present law to this effect is the result of accident rather than of design. It is therefore necessary to put these considerations in context by looking more widely at the law which controls the causing of death on the road.

[265] It may perhaps be noted that the reserve which the House of Lords expressed in *Reid* [1992] 1 WLR 793 about the use, without further explanation, of the Diplock direction suggested in *Lawrence* in all cases of causing death by reckless driving (and therefore, necessarily, in all cases of motor manslaughter) related to the use of the Diplock formula without more as a direction to the jury: see para 3.119 above. Lord Goff of Chieveley, while modifying what had been thought to be binding rules as to how the jury should be directed, was quite clear that Lord Diplock's "encapsulation of the law", as set out above, was correctly stated: see [1992] 1 WLR 793, 816E-F.

[266] See para 3.155 above.

[267] See paras 3.145-3.153 above.

[268] Thus, for the exclusion of mere inadvertence, see formulation (d) quoted in para 3.140 above. For the requirement that negligence must be "gross", see for instance the resolution of the actual cases of Drs Prentice and Sullman, and Adomako, described in paras 3.145-3.150 above.

[269] See paras 3.103-3.104 above. It is true that in *Reid* a good deal was said about the particular responsibilities involved in driving a vehicle, and the public policy considerations affecting driving offences expressed in terms of "recklessness": see eg Lord Keith of Kinkel, [1992] 1 WLR 793, 796B, and Lord Goff of Chieveley, *ibid*, at p 811B. These observations were, however, directed at the construction of the statutory concept of "reckless" *driving*. They did not touch on the different question whether and in what terms there should be a special category of *manslaughter* directed at unintentional killing on the road.

3.159 We have already noted the existence of a separate statutory offence of causing death by reckless driving, and the difficulties of the interaction of that offence with the offence of "reckless" manslaughter.[270] This statutory offence has, however, now been abolished, by the Road Traffic Act 1991, and replaced by an offence of causing death by driving *dangerously*. This change was part of the recommendations of a comprehensive study by the Road Traffic Law Review Committee.[271]

3.160 The North Report advised that there should be a change from offences of reckless driving to a new hierarchy of offences which focused on the manner of the driving of the accused rather than on his or her state of mind. This approach would avoid the problems associated with "recklessness", which were enumerated in the Report.[272] As the Report itself pointed out, most of these criticisms related to the problem of proving reckless driving.[273] In contrast to the type of criticism directed at *Lawrence* recklessness in the context of other offences, the North Report found

> a general, but not unanimous, view that, despite the inferences which a jury or magistrate might draw, the test in *Lawrence* is too subjective. It is said that the more subjective the test, and the further removed from an objective assessment of the standard of driving, the harder it is to provide cogent evidence of the commission of the offence and that this deters the bringing of prosecutions for reckless driving in serious instances of bad driving.[274]

Criticism also attached to the "*Caldwell* lacuna"[275] which, it was said, allowed a defendant easily and spuriously to sow doubt in the mind of the fact-finder, and thereby to exculpate himself, by claiming that at the time of the accident he did apply his mind to the question of the existence of a risk, but had concluded that there was none.[276]

3.161 On the other hand, the *Lawrence* test was also criticised as being in some respects too wide, on the ground that any collision between a car and another individual or vehicle necessarily involved "an obvious and serious risk of injury or damage". As a result, it was theoretically possible that a driver could be found guilty of reckless driving when the behaviour involved was no more than mere thoughtless incompetence. To charge such a

[270] See para 3.103 above. It is generally thought that special offences of causing death by bad driving (variously described in statutory terms) were required because of the reluctance of juries, at least in the 1950s, to convict of manslaughter even in cases showing a high degree of negligence. "The 'barbarous-sounding' term *manslaughter* smacked too much of 'traditional' crime to be applied to a mere errant motorist": Elliott and Street *Road Accidents* (1968) p 20.

[271] (1988): the "North Report".

[272] North Report, paras 5.7-5.9.

[273] *Ibid*, at para 5.7.

[274] *Ibid*, at para 5.8(b).

[275] See para 3.109 above.

[276] *Ibid*, at para 5.8(c).

driver with reckless driving could, it was said, devalue the importance of the offence in singling out cases of really bad driving.[277]

3.162 The North Report considered[278] the law of manslaughter; and noted that as a result of *Governor of Holloway Prison ex parte Jennings*[279] and *Seymour*,[280] whether a defendant was placed at risk of conviction of manslaughter (with the associated social stigma and a possible sentence of life imprisonment), or of the statutory offence (which then carried a maximum sentence of five years custody), was purely a matter of prosecutorial discretion.[281] The committee contrasted this position with that in Scotland, where culpable homicide was distinct from the offence of causing death by reckless driving, as Lord Fraser of Tullybelton pointed out in *Seymour*:

> ...although the ingredients of the two offences are the same, the degree of recklessness required for conviction of the statutory offence is less than that required for conviction of the common law crime... .[282]

On consultation, the committee was provided with a similar analysis by experienced Scottish judicial and legal commentators. It observed that the fact that the two offences could be, and were in practice, charged in the alternative reinforced the view that in Scotland there was a difference between them.

3.163 The Report then turned[283] to consider the legal position if its recommendations for the retention of a "causing death" offence and for the replacement of "recklessness" in that offence by a description of very bad driving were implemented. The proposed reforms would create a distinction both in England and Scotland between the more serious offence of manslaughter or culpable homicide, and the less serious statutory offence. In the view of the Report,

> The drawing of such a distinction seems to us to be right both in principle and in policy terms. The effect of our recommendations will be the creation of a hierarchy of offences concerned with deaths caused by motor vehicles.[284]

[277] *Ibid*, at para 5.8(d).

[278] *Ibid*, at para 6.11.

[279] [1983] 1 AC 624.

[280] [1983] 2 AC 493.

[281] Thus reinforcing the observations of Lord Roskill himself in *Seymour*, cited at n 172 to para 3.103 above.

[282] [1983] 2 AC 493, 500.

[283] North Report, para 6.12.

[284] *Ibid.*

3.164 These proposals were implemented by the Road Traffic Act 1991, which substituted for the statutory offence of causing death by reckless driving an offence of causing death by driving dangerously, in the following terms:

> 1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on the road or other public place is guilty of an offence.
>
> 2. ...
>
> 2A.--(1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)--
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
>
> (3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused... .

3.165 It can be seen that this section imposes a gross negligence test. The defendant's conduct is to be judged in relation to an external standard, that of a competent and careful driver; and his conduct has to fall *far* below that standard in order for him to be guilty of the offence.

3.166 In the event, therefore, the North Committee's aim of producing a hierarchy of offences, with common law manslaughter retained to address the most serious conduct of all, has not been realised in practice. *Prentice* made it clear, if it was not clear already, that the *Lawrence* test, with all its difficulties, and covering the very wide range of different

situations which the committee itself noted,[285] remained the relevant test for motor manslaughter. But *Prentice* also made it clear, by the contrast made in that case between *Lawrence* motor manslaughter and the "gross" negligence which applies in the rest of the law of manslaughter, that motor manslaughter imposes a standard lower, not higher, than that of the new offence of driving dangerously.[286] The wide range of motor manslaughter may continue to be mitigated by prosecutorial practice.[287] But it was to the rules created by law, and not to the discretion of the prosecutor, that the North Committee rightly looked to create the rational system of liability for which it argued.

3.167 It is therefore necessary to conclude that the North Report's objective of putting the law in this important area on a rational and clear basis, with a hierarchy of offences related to the seriousness of the defendant's conduct, cannot be achieved while motor manslaughter remains a common law offence; or, at least, until the *Lawrence/Seymour* test for motor manslaughter is discarded. This is a further reason, added to the obvious disquiet which is apparent in the judgment in *Prentice*, for a critical review of the law of motor manslaughter. This review can be found in paragraphs 5.22-5.29 below.

H. Recklessness as a former element of the law of murder

3.168 We have been primarily concerned in this Part has primarily been concerned with the dividing line between manslaughter and the accidental causing of death. However, it must not be forgotten that at the upper end of the scale of seriousness a demarcation must also be made between manslaughter and murder.

3.169 The law of manslaughter was affected in 1985 by the decision in a murder case, *Moloney*,[288] in which the House of Lords held that cases in which the defendant may have foreseen that death or really serious injury would result from his act, without intending such consequences, would no longer constitute murder, and would therefore by default fall into the category of manslaughter. This class of case was described by Lord Lane CJ in *Hancock*[289] as

> where the defendant's motive or purpose is not primarily to kill or injure, but the methods adopted to achieve the purpose are so dangerous that the jury may come to the conclusion that death or injury to some third party is highly likely.[290]

[285] See para 3.161 above.

[286] Whereas the North Committee (at paras 6.12-6.13 of their Report) appeared to conclude that their recommendation of the replacement of causing death by reckless driving by the new dangerous driving offence would create a distinction in English law between manslaughter and the statutory offence, with manslaughter the more serious of the two.

[287] Which the North Report recognised, but deprecated: see n 281 to para 3.162 above.

[288] [1985] AC 905.

[289] [1986] 1 AC 455.

[290] [1986] 1 AC 455, 459E.

3.170 Any statutory definition of manslaughter must include, at the top end of the scale, those cases which no longer fall within the offence of murder as a result of the decision in *Moloney*. That question is taken up in paragraphs 5.16-5.21 below.

PART IV

THE LIABILITY OF CORPORATIONS

A. Introduction

4.1 As we explained in Part I, we decided to devote special attention to corporate liability for manslaughter, because all the recent cases which have evoked demands for the use of the law of manslaughter following public disasters have involved, actually or potentially, corporate defendants. On the only occasion on which such a case has been brought to trial,[1] the obscurities of the law of manslaughter were compounded by the obscurities of the law of corporate criminal liability. For this reason alone, we are satisfied that a real effort should be made to put the law on a clearer footing.

4.2 At the same time we should not ignore what appears to be a widespread feeling among the public that in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation, such as the crew of a ferry boat owned by a leading public company,[2] it would be wrong if the criminal law placed all the blame on those junior employees and did not also fix responsibility in appropriate cases on their employers who are operating, and profiting from, the service being provided to the public. If the law is able to address these concerns, consideration also needs to be given to the question whether it is the law of manslaughter, as opposed to, for example, a regulatory offence,[3] which is the appropriate response in such cases. Whatever the logical or emotional basis for these concerns, one of the purposes of the present study is to enable them to be ventilated in the context of a critical discussion of the law of manslaughter. The present position is very unsatisfactory because the technical structure of the law is in effect preventing these very serious policy issues from even being considered.

4.3 This study looks at corporate liability only in the context of gross negligence manslaughter. We have already expressed our provisional view that we should not recommend the continuation of unlawful act manslaughter as a separate category of liability. A fortiori, it cannot be rational or just to use the very wide rules of unlawful

[1] *Stanley and others* (CCC No 900160, October 1990), discussed at some length below.

[2] For example, *The Herald of Free Enterprise*: the prosecution of the owner, P&O European Ferries (Dover) Ltd, in the case cited at n 1 to para 4.1 above, is discussed at paras 4.31 and 4.38-4.44 below. By contrast, the master, but not the owners, of the dredger which collided with the *Marchioness* pleasure boat in 1989, killing 51 people, was prosecuted with an offence under s 32 of the Merchant Shipping Act 1988. When the charges were dismissed after two juries had failed to agree, a private prosecution was brought against the owners for manslaughter, but the Divisional Court held that the DPP might take over the proceedings and discontinue them under s 23 of the Prosecution of Offenders Act 1985: *Bow Street Stipendiary Magistrate, ex parte South Coast Shipping Co Ltd* [1993] QB 645.

[3] British Rail pleaded guilty to failing to ensure the safety of employees and passengers, and were fined £250,000, following the 1987 Clapham rail crash in which 34 people died: *The Guardian* 15 June 1991.

act manslaughter to impose criminal liability on the corporations in whose operations a death has been caused on the basis that these operations involved an illegality of some kind or other.[4] Such a basis for fixing serious criminal liability would be likely to have effects which would be wholly random and erratic in their nature. On the other hand, when properly handled, the rules of gross negligence manslaughter can be used to elicit and apply the policy considerations which should be involved in imposing criminal liability on corporations for causing death. This is a task which in our view cannot possibly be performed under the rules of unlawful act manslaughter.

4.4 Before we grapple with the particular considerations which affect corporate *manslaughter*, we must first say something about the law of corporate criminal liability in general. This, of course, is the law which must be applied where it is sought to impose criminal liability on a corporation for causing death, and, so far, there have been conspicuous difficulties in the attempts made to apply it.

B. The general law of corporate liability

Background

4.5 It is trite law that a corporation is a separate legal person,[5] but it has no physical existence and it cannot, therefore, act or form an intention of any kind except through its directors and servants. There has never been any doubt that the members or officers of a corporation cannot shelter behind the corporation and they may be successfully prosecuted as individuals for any criminal acts they may have performed or authorised. The real problem is the extent to which the corporate body itself may be criminally liable.

4.6 There appear to have been only three prosecutions of a corporation for manslaughter in the history of English law,[6] and none of these cases resulted in a conviction. Some commentators have pointed to a number of outside factors which contribute to the low level of prosecutions brought against corporations for criminal offences generally.[7] In this Paper, however, our concerns are devoted to studying the substantive law, the

[4] In her recent study *Corporations and Criminal Responsibility* (1993), Wells points to what appears to be a failure to apply the logic of the criminal law to corporations as much as to individuals, and suggests (at p 78) that, granted the continued existence of the unlawful act doctrine, it might well be applied to convict of manslaughter corporations which cause death by failures amounting to regulatory offences: for example, the regulatory offence committed by British Rail in connection with the Clapham rail crash, as noted in n 3 to para 4.2 above. She does not however argue for the continuation on those grounds of the unlawful act doctrine. Instead she suggests, as we do ourselves, that liability in these cases should be subject to the more sophisticated assessment which is made possible by analysis in terms of gross negligence.

[5] *Salomon v Salomon* [1897] AC 22.

[6] *Cory Bros Ltd* [1927] 1 KB 810; *Northern Strip Mining Construction Co Ltd, The Times* 2, 4 and 5 February 1965; *P&O European Ferries (Dover) Ltd*, (1991) 93 Cr App R 72 (CCC).

[7] See for example Bergman, *Deaths at Work: Accidents or Corporate Crime* (1991) pp 15-60; Wells, *Corporations and Criminal Responsibility* (1993) pp 53-59. These writers allege inadequate scrutiny by both the police and the Health and Safety Executive in the context of a general culture which does not recognise corporate crime as being "real" crime.

reasons for the failure, as a matter of law, of such prosecutions as are brought, and proposals for the reform of the law, if appropriate.

The early development of corporate liability

4.7 The earliest recognised form of corporate crime involved failures to perform an absolute duty imposed by law. So, for example, in *Birmingham & Gloucester Rly Co*,[8] the Divisional Court in 1842 upheld an indictment against the defendant company for failing to construct connecting arches over a railway line built by it, in breach of a duty imposed upon it by the statute which authorised the incorporation of the company.[9] This type of case was relatively straightforward. The duty was imposed by statute directly upon the company. It was an absolute duty, thus avoiding the problems the courts faced in later cases when invited to impute mens rea to a corporate body.[10] Moreover, the breach of duty consisted of an omission, and there was no distraction created by the existence of an obvious individual within the company against whom proceedings could have been brought instead.

4.8 There were, however, strong policy reasons for going further. Four years later the Divisional Court upheld an indictment for public nuisance against a company, holding that a company could be liable for the positive acts of its servants. In *Great North of England Rly Co*[11] the defendant corporation had obstructed the highway while it was building a railway, and had failed to comply with statutory instructions which had imposed a duty to build a bridge for other traffic over the railway during construction. Lord Denman CJ could not find any grounds of principle on which to distinguish between offences of omission, such as that charged in the *Birmingham and Gloucester Rly Co* case, and those based on the commission of a positive act. For pragmatic reasons also he rejected an argument that in the latter type of case it was not necessary to proceed against the corporation because it might be possible to identify and prosecute an individual agent of the company responsible for the breach:

> There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority... .[12]

4.9 This liability of corporations for positive criminal *acts* developed first through the rules of vicarious liability. This doctrine, whereby a master was held liable for the tortious acts

[8] (1842) 3 QB 223; 114 ER 492.

[9] 6&7 Will IV c. xiv.

[10] See paras 4.11-4.15 below for an account of how the courts succeeded in imputing mens rea to corporations.

[11] (1846) 9 QB 315; 115 ER 1294.

[12] (1846) 9 QB 315, 327; 115 ER 1294, 1298.

of his servants in the course of their employment, was developed in the law of tort in the early part of the eighteenth century, but the principle was not extended wholesale to the criminal law.[13] Instead, a master could generally only be held guilty of his servant's criminal acts in accordance with the ordinary principles of secondary participation in crime. There were, however, two common law exceptions to this principle: these were to be found in the offences of public nuisance, as was in issue in *Great North of England Rly Co*; and criminal libel.[14] The courts also developed a number of exceptions involving statutory offences. These statutory exceptions were held to be necessary because a failure to find that the statute by implication extended liability for the servant's acts to the master would, it was considered, render the statute "nugatory" and thereby defeat the will of Parliament.[15]

4.10 The courts formulated two distinct principles to assist in imposing corporate liability for statutory offences. The first of these, the delegation principle, ensured that a person was held liable for the acts of another where he had delegated to that other the performance of duties imposed on him by statute. These cases often concerned offences under the Licensing Acts and similar statutes where only the licensee or the keeper of the premises could commit the offence.[16] The second principle was that of extended construction,[17] which involved attributing a servant's act to his master. This principle was applied in the context of many statutory offences in which selling was the central feature of the actus reus, such as offences created by trade control legislation,[18] and in cases where the offence required "being in possession", "presenting a play", "keeping a van" and "using a vehicle".[19] The master was held to have "committed" the act even though, in fact, he was not physically involved in it. This fiction was not, however, extended beyond the physical acts of the employee. Unless, therefore, the employer himself had the requisite mens rea, this form of vicarious liability was limited to offences of strict liability.[20]

[13] *Huggins* (1730) 2 Stra 883; 93 ER 915.

[14] Card, Cross and Jones, *Criminal Law* (12th ed, 1992) p 554; Smith and Hogan, *Criminal Law* (7th ed, 1992) p 171.

[15] *Mullins v Collins* (1874) LR 9 QB 292, 295, cited in Smith and Hogan, *Criminal Law* (7th ed, 1992) p 172.

[16] See, for example, *Allen v Whitehead* [1930] 1 KB 211, where the delegation principle was applied in respect of an offence contrary to the Metropolitan Police Act 1839 s 44, which could be committed only by a person "who shall have or keep any house".

[17] Per Card, Cross and Jones *Criminal Law* (12th ed 1992) p 555.

[18] For example, in *Coppen v Moore (No 2)* [1898] 2 QB 306, the owner of a shop was convicted under the Merchandise Marks Act 1887 s 2(2) of selling goods "to which any false trade description is applied", although the goods had been sold by a shop assistant without the knowledge of the defendant or the branch manager.

[19] See Smith and Hogan, *Criminal Law* (7th ed, 1992) p 176.

[20] A case that might be seen as an exception to this general principle was *Mousell Bros Ltd v London and North-Western Rly Co* [1917] 2 KB 836, when the Divisional Court held that a company could commit an offence under s 99 of the Railways Clauses Consolidation Act 1845, of giving a false account of the quantity of goods conveyed by it by rail, with intent to avoid payment of tolls, because "looking at the language and the purpose of this Act,...the Legislature

The principle of identification

4.11 These steps were piecemeal; dependent on *statutory* construction; and limited to offences of strict liability. Corporate liability was excluded from common law offences, except for the two anomalous cases mentioned in paragraph 4.9 above. However, a substantial change took place in the early 1940s. In three cases which held that a corporation could be directly guilty of a criminal offence, in circumstances in which the doctrine of vicarious liability could not apply, what is now known as the principle of identification was established in English law. The introduction of this, general, principle meant that it was possible to impose criminal liability on a corporation, whether as perpetrator or accomplice, for virtually any offence, notwithstanding that mens rea was required, and without having to rely on statutory construction.

4.12 In the first of these cases, *DPP v Kent and Sussex Contractors Ltd*,[21] a company was charged with offences contrary to the Defence (General) Regulations 1939,[22] of making use of a document (signed by the transport manager of the company) which was false in a material particular, with intent to deceive; and of making a statement (in the document) which it knew to be false in a material particular. The magistrates found that the servants of the company knew that the statement was false, and used the document with intent to deceive, but they held that the company could not itself be guilty of the offences charged because it was not possible to impute the required mens rea to the company. The

intended to fix responsibility for this quasi-criminal act upon the principal if the forbidden acts were done by his servant within the scope of his employment": per Viscount Reading CJ at p 845. The fact that the false account was given by a branch manager, a person of senior standing within the company, might have been significant; Williams in *Criminal Law: The General Part* (2nd ed, 1961) p 274, considered that "[t]he best explanation of this decision seems to be that it belongs to an intermediate stage in the development of corporate criminal responsibility. At the present day, the company would be held responsible...because the act or state of mind of a director or manager would be imputed to the company as its personal wrong": on the latter development, see paras 4.11-4.15 below.

[21] [1944] KB 146.

[22] Reg 82(1)(c), which stated:

If, with intent to deceive, any person...(c) produces, furnishes, sends or otherwise makes use of for the purposes [of any of these regulations or of any order...made under any of these regulations] any book, account, estimate, return, declaration, or other document which is false in a material particular; he shall be guilty of an offence...

and reg 82(2):

If, in furnishing any information for the purposes...of any order...made under any of these regulations, any person makes any statement which he knows to be false in a material particular...he shall be guilty of an offence...

It was alleged that the company made use of the false statement in the document for the purposes of the Motor Fuel Rationing (No 3) Order 1941, art 12(1), which provided:

Every person desiring to obtain (a) a licence under any of the provisions of this Order, or (b) coupons for the purposes of this Order, shall furnish such information:- (i) as may be requested by or on behalf of the Board of Trade; (ii) as may be prescribed by direction of the Board of Trade and any such direction may specify the form in or on which such information is to be furnished.

Divisional Court disagreed. Lord Caldecote CJ explained how a company can form a criminal intent:

> I think that a great deal of [counsel for the company]'s argument on the question whether there can be imputed to a company the knowledge or intent of the officers of the company falls to the ground, because although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought... . In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular. Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose... .[23]

4.13 Later that year, in *ICR Haulage Ltd*,[24] a company was held indictable for common law conspiracy to defraud, another offence requiring mens rea to which vicarious liability could not apply. The corporation was not held responsible on the basis of liability for the acts of its agents; instead the corporation was regarded as having committed the acts personally. *DPP v Kent and Sussex Contractors Ltd*[25] was treated as authority for the proposition that a state of mind could be attributed to a company. The last of the trio of 1944 cases was *Moore v Bresler*,[26] which followed the two earlier decisions.

4.14 The nature of the principle of identification, and the clear distinction between it and the doctrine of vicarious liability, was described by Lord Reid in the leading House of Lords case, *Tesco Supermarkets Ltd v Nattrass*:[27]

> [A corporation] must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable... . He is an embodiment of the company...and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.[28]

[23] [1944] KB 146, 155.

[24] [1944] KB 551.

[25] [1944] KB 146.

[26] [1944] 2 All ER 515.

[27] [1972] AC 153, 170.

[28] [1972] AC 153, 170E-F. Lord Pearson, at p 190G, also stressed that the principle applied in the instant case was different from that of vicarious liability.

4.15 The distinction between vicarious liability and the liability of corporations under the identification principle was also stressed in the recent case of *R v HM Coroner for East Kent ex parte Spooner*.[29] Bingham LJ said in that case:

> It is important to bear in mind an important distinction. A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter...it is required that the mens rea and actus reus of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself.[30]

The controlling officers

4.16 The principle by which the controlling officers should be identified was described by Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*:[31]

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[32]

4.17 This dictum was approved by the majority in the House of Lords in *Tesco Supermarkets Ltd v Nattrass*, although the different judgments showed variations in the detailed application of the test. Lord Reid said that a company may be held criminally liable for the acts only of

> ...the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company... .[33]

Viscount Dilhorne, on the other hand, said that a company should only be identified with a person

[29] (1989) 88 Cr App R 10.

[30] (1989) 88 Cr App R 10, 16.

[31] [1957] 1 QB 159.

[32] [1957] 1 QB 159, 172.

[33] [1972] AC 153, 171F.

> ...who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.[34]

Lord Diplock thought that the question was to be answered by

> ...identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company.[35]

Lord Pearson, too, thought that the constitution of the particular company should be taken into account.

4.18 The tests outlined above would, if applied strictly, produce rather different results. A company's articles of association reveal nothing about an individual officer's duties in the day to day running of the company. Viscount Dilhorne's test would appear to be stricter than the others, since there are very few people in a company who are not responsible to others for the manner in which they discharge their duties. However, the general principle is clear: the courts must attempt to identify the "directing mind and will" of the corporation, the process of such identification being a matter of law.[36]

4.19 It remains to be seen whether this principle can apply to a director or official whose appointment is invalid. There are dicta by Lord Diplock in the *Tesco* supermarkets[37] case suggesting that it would not apply: he stressed that "the obvious and only place" to look in deciding whose acts are to identified with the corporation is the constitution of the corporation, its articles and memorandum of association.[38] This emphasis on the formal structure of the company would rule out anyone not validly appointed under the Companies Act 1948. This failure to take into account the realities of the situation seems to be undesirable as a matter of principle.[39]

4.20 The person who is identified with the corporation renders it liable only so long as he acts within the scope of his office.[40] However, this requirement does not mean that activities which are performed contrary to the corporation's interests exclude its liability. In *Moore*

[34] [1972] AC 153, 187G.

[35] [1972] AC 153, 200A.

[36] [1972] AC 153, per Lord Reid at p 170F-G.

[37] [1972] AC 153, 199E.

[38] [1972] AC 153, 199H-200A.

[39] As the Commission's Working Party on the Criminal Liability of Corporations suggested: Working Paper No 44 (1972), at para 40.

[40] *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146.

v Bresler Ltd[41] the respondent company was convicted of making false tax returns contrary to the Finance (No 2) Act 1940. The returns were actually made by the secretary of the company and the general manager of the branch concerned, and were designed to conceal their own fraudulent sale of company property. The court held that:

> The sales undoubtedly were fraudulent, but they were sales made with the authority of the respondent company by these two men as agents for the respondent company... . These two men were important officials of the company, and when they made statements and rendered returns...they were clearly making those statements and giving those returns as officers of the company... . Their acts, therefore, ...were the acts of the company.[42]

C. Corporate liability for manslaughter

The general theory

4.21 Although, as has been seen, the principle that a corporation can itself be held guilty of a criminal offence became established in English law in the 1940s, this principle does not extend to all crimes. There are some crimes, such as bigamy, which by their very nature can only be committed by a natural person.[43] Similarly, a corporation cannot be convicted of a crime for which death or imprisonment are the only punishments, although this restriction only excludes murder and treason, since in the case of all other crimes the courts also have a power to impose fines.[44]

4.22 At one time, manslaughter was also regarded as a member of the class of crimes with which a company could not be charged, because it was thought that a corporation could not be guilty of a felony or a misdemeanour which involved personal violence. This was the basis of the decision in the case of *Cory Bros Ltd*,[45] in which an indictment against a company for manslaughter was quashed. However, this case was decided before the principle of identification was developed. As Stable J said in *ICR Haulage Ltd*:[46]

> The learned judge [in *Cory Bros Ltd*] advanced no reasons of his own for quashing the whole indictment, simply expressing the view that he felt compelled by the authorities to which his attention had been called to decide as he did. It is sufficient, in our judgment, to say that, inasmuch as that case was decided before the decision in *DPP v Kent and Sussex Contractors*..., if the matter came before the court today, the result might well be different.

[41] [1944] 2 All ER 515.

[42] [1944] 2 All ER 515, 516H-517A per Viscount Caldecote CJ.

[43] *Halsbury's Laws of England* (4th ed, 1990) vol 11(1) para 35, which cites as examples perjury, bigamy and treason.

[44] *Halsbury's Laws, loc cit.*

[45] [1927] 1 KB 810.

[46] [1944] KB 551.

> As was pointed out by Hallett J in *DPP v Kent and Sussex Contractors*, this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development.[47]

4.23 An unreported case in 1965 at Glamorgan Assizes appeared to support Stable J's argument. In *Northern Strip Mining Construction Co Ltd*[48] a welder-burner was drowned when a railway bridge which the company was demolishing collapsed. Workmen had been instructed to burn down sections of the bridge, starting in its middle. The defendant company was acquitted on the facts of the case, but neither counsel nor the presiding judge appeared to have any doubt about the validity of the indictment. Indeed, defence counsel directly conceded the propriety of such an indictment when he said

> It is the prosecution's task to show that the defendant company, in the person of Mr Camm, managing director, was guilty of such a degree of negligence that amounted to a reckless disregard for the life and limbs of his workmen.[49]

The issue was not, however, fully discussed, and earlier authorities were not considered, so that the matter remained in some doubt.

4.24 The question whether a corporation could properly be charged with manslaughter came before the courts again during the litigation following the Zeebrugge ferry disaster. The coroner conducting the inquest held that a corporation could not be indicted for manslaughter. When this decision was challenged in an application for judicial review,[50] Bingham LJ said (of the question whether a corporate body was capable of being found guilty of manslaughter):

> ...the question has not been fully argued and I have not found it necessary to reach a final conclusion. I am, however, tentatively of opinion that, on appropriate facts the mens rea required for manslaughter can be established against a corporation. I see no reason in principle why such a charge should not be established.[51]

4.25 The question was finally decided in the criminal proceedings brought against the company which owned the ferry. In *P&O European Ferries (Dover) Ltd*,[52] counsel for the defendant company argued first, that English law did not recognise the offence of

[47] [1944] KB 551, 556.

[48] *The Times* 2, 4 and 5 February 1965.

[49] *The Times* 4 February 1965.

[50] *R v HM Coroner for East Kent ex parte Spooner* (1989) 88 Cr App R 10.

[51] *R v HM Coroner for East Kent ex parte Spooner* (1989) 88 Cr App R 10, 16.

[52] (1991) 93 Cr App R 72 (CCC).

corporate manslaughter, and, more fundamentally, that manslaughter could only be committed when one natural person killed another natural person. Turner J rejected these arguments and held that an indictment for manslaughter could lie against the company in respect of the Zeebrugge disaster.

4.26 In responding to the first argument put forward by the defence, Turner J outlined the development of corporate criminal liability. He noted that the cases of *Birmingham and Gloucester Rly*[53] and *Great North of England Rly Co*[54] established that an indictment could lie against a corporation, but that the judgments in those cases also stated exceptions to the general liability of corporations. For example, both Patterson J in *Birmingham and Gloucester Rly*[55] and Denman CJ in *Great North of England Rly Co*[56] said that a corporation could not be indicted, inter alia, for a felony or for crimes involving personal violence. The first of these exceptions could be justified at the time because the appropriate penalty could not have been imposed upon a corporation. The second exception, offences against the person, was explained by Denman CJ in his judgment on the ground that since a corporation had no social duties, it could not suffer from a "corrupt mind", as natural persons could.[57] Similarly, in the case of *Cory Brothers & Co*,[58] Finlay J had felt bound by the authorities[59] to hold that "...an indictment will not lie against a corporation either for a felony or a misdemeanour involving personal violence,"[60] on the ground that mens rea could not be present in the case of an artificial entity like a corporation.[61]

4.27 Rejecting the defence argument that these dicta demonstrated that a corporation, as a matter of substantive law, could not be indicted for manslaughter, Turner J referred to

[53] (1842) 3 QB 223; 114 ER 492.

[54] (1846) 9 QB 315; 115 ER 1294.

[55] (1842) 3 QB 223, 232; 114 ER 492, 496.

[56] (1846) 9 QB 315, 326; 115 ER 1294, 1298.

[57] (1991) 93 Cr App R 72, 74-75, and see also para 4.22 above.

[58] [1927] 1 KB 810.

[59] The cases cited were the two railway cases; *Tyler and International Commercial Co Ltd* [1891] 2 QB 588; and *Pharmaceutical Society v London and Provincial Supply Association Ltd* (1879) 4 QB 313, 319 (DC). However, as Turner J pointed out, (1991) 93 Cr App R 72, 76, when the *Pharmaceutical* case reached the House of Lords, (1880) 5 App Cas 857, Lord Blackburn, at p 869, observed that although some forms of punishment were not appropriate to a corporation, this should not be a bar to conviction since a corporation could be fined. Lord Blackburn continued at p 870:

> A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself.

[60] [1927] 1 KB 810, the headnote summary, cited by Turner J at (1991) 93 Cr App R 72, 76

[61] (1991) 93 Cr App R 72, 76.

three leading criminal cases,[62] and also to three other cases[63] which introduced and developed the principle of identification in English law. As we noted at paragraph 4.11 above, the development of corporate criminal liability did not truly begin until these decisions. Before that time the criminal liability of corporations was co-extensive with the vicarious liability of natural persons, in other words, restricted to certain breaches of statutory duties, criminal libel, and nuisance. The principle of identification revolutionised corporate liability since, by "identifying" the corporation with the state of mind and actions of one of its controlling officers, it was possible to impute mens rea to a corporation and thereby to convict a corporation of a criminal offence requiring mens rea.

4.28 Turner J concluded his summary of the English case-law by saying:

> Since the nineteenth century there has been a huge increase in the numbers and activities of corporations... . A clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law. By tracing the history of the cases decided by the English Courts over the period of the last 150 years, it can be seen how first tentatively and finally confidently the Courts have been able to ascribe to corporations a "mind" which is generally one of the essential ingredients of common law and statutory offences.[64]

4.29 Having considered the historical basis for the liability of a corporation for manslaughter, Turner J went on to consider the second argument raised by the defence, that the definition of manslaughter in English law positively excluded the liability of a non-natural person:

> I find unpersuasive the argument of the company that the old definitions of homicide positively exclude the liability of a non-natural person to conviction of an offence of manslaughter. Any crime, in order to be justiciable, must have been committed by or through the agency of a human being. Consequently, the inclusion in the definition of the expression "human being" as the author of the killing was either tautologous or, as I think more probable, intended to differentiate those cases of death in which a human being played no direct part... .[65]

4.30 In conclusion he decided, in accordance with the case-law which he had referred to, that where a corporation through the controlling mind of one of its agents does an act which

[62] *DPP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (DC); *ICR Haulage Ltd* [1944] KB 551 (DC); *Moore v Bresler* [1944] 2 All ER 515 (DC): see paras 4.11-4.13 above.

[63] *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; *HL Bolton Engineering Co Ltd v TJ Graham* [1957] 1 QB 159; and *Tesco Supermarkets v Nattrass* [1972] AC 153 (HL).

[64] (1991) 93 Cr App R 72, 83.

[65] (1991) 93 Cr App R 72, 84.

fulfils the prerequisites of the crime of manslaughter, it is properly indictable for that crime.[66]

The rejection of the principle of aggregation and the requirement that an individual "controlling officer" should be guilty

4.31 Despite Turner J's ruling that an indictment for manslaughter could properly lie against a corporation,[67] the prosecution against P&O European Ferries (Dover) Ltd ultimately failed. The judge directed the jury that, as a matter of law, there was no evidence upon which they could properly convict six of the eight defendants, including the company, of manslaughter.[68] The principal ground for this decision in relation to the case against the company, was that, in order to convict it of manslaughter, one of the personal defendants who could be "identified" with the company would have himself to be guilty of manslaughter. Since there was insufficient evidence on which to convict any of those personal defendants,[69] the case against the company had to fail. In coming to this conclusion Turner J ruled against the adoption into English criminal law of the "principle of aggregation".[70] This principle would have enabled the faults of a number of different individuals, none of whose faults would individually have amounted to the mental element of manslaughter, to be aggregated, so that in their totality they might have amounted to such a high degree of fault that the company could have been convicted of manslaughter.

4.32 This principle is similar in effect to the civil rules which govern the attribution of knowledge to a corporate entity. In our consultation paper on Fiduciary Duties and Regulatory Rules,[71] we stated that, as a matter of principle, any matter known by part of a company would be known by all parts of it.[72] There is, for example, authority for such a doctrine in the context of (civil) negligence. In *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd*,[73] the defendant company acted as agents, buying goods from the plaintiff company, for a third company, Taylors, which eventually went into liquidation, owing the plaintiff company money. The defendant company's salesman and buyer had represented to the plaintiff company that Taylors was credit-worthy. In fact, Taylors had persistently failed to settle its accounts with the defendant company and owed it money. The salesman did not know this because of negligent failures in the defendant company's accounting system, which was the responsibility of its manager and its book-keeper. Since

[66] (1991) 93 Cr App R 72, 84.

[67] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[68] *R v Stanley and others* 19 October 1990 (CCC No 900160), unreported.

[69] This aspect of the decision is discussed at paras 4.38-4.41 below.

[70] *R v Stanley and others* 19 October 1990 (CCC) transcript p 2.

[71] Law Commission Consultation Paper No 124 (1992) (hereafter, "LCCP No 124"), paras 2.3.1-2.3.7.

[72] *Harrods Ltd v Lemon* [1931] 2 KB 157; *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201; see further LCCP No 124, para 2.3.6.

[73] [1967] 2 All ER 850.

the salesman was entitled to assume that if Taylors were not meeting their liabilities he would have been warned of this by the manager and the book-keeper, he was not negligent in making the misrepresentation.[74] Nor could a claim succeed against the manager or the book-keeper, since they did not know about the representations made by the salesman.[75] However, Cairns J was prepared to find the defendant *company* liable for the misrepresentation since it was the employer of both the salesman, who made the representation, and the manager and the book-keeper through whose negligence the representation was made. It can be seen from the facts that elements of the tort of negligent misrepresentation were distributed in different parts of the company. Here the acts, rather than the individual torts, of each servant were attributed to the company and together they amounted to a breach of the duty owed by the company to the plaintiffs.

4.33 However, the court declined to apply this principle in the civil case, *Armstrong v Strain*,[76] which concerned liability for the tort of fraudulent misrepresentation, which requires that a material misrepresentation was made knowingly. The respondent vendor employed a firm of estate agents to sell his bungalow. The agent made a material representation about the property which was false, without having been authorised to do so by the vendor and without his knowledge. The vendor, however, knew of the facts which rendered the representation untrue, which were not known by the agent. The Court of Appeal held that neither the vendor nor the agent were guilty of fraud, since, in the words of Devlin J, the trial judge:

> You cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind.[77]

In LCCP No 124[78] we stated that this case is distinguishable from the authorities in favour of the pooling of information held by different agents or parts of a firm because it was a case of *fraud*, and the courts are reluctant to find fraud unless dishonesty is proven.

4.34 The degree to which the courts would be prepared to apply the civil law principle described in paragraph 4.32 to criminal cases is uncertain. However, it is worth noting that Smith and Hogan[79] see *WB Anderson & Sons v Rhodes* and *Armstrong v Strain* as illustrative of a distinction between negligence and other forms of mens rea. The implication, with regard to manslaughter, which they drew from the cases was that the principle of aggregation should apply to gross negligence manslaughter but not to

[74] [1967] 2 All ER 850, 856B-C per Cairns J.

[75] *Ibid*, at p 856H.

[76] [1952] 1 KB 232, 246.

[77] *Ibid.*

[78] Para 2.3.7.

[79] *Criminal Law* (7th ed, 1992) at p 184.

manslaughter expressed in terms of recklessness. If a company owed a duty of care and its actions fell far below the standard required, even if this was the fault of a number of officers, the *company* would still be guilty of gross negligence.

4.35 The question of aggregation was raised, but not resolved, in *R v HM Coroner for East Kent ex parte Spooner*.[80] Rejecting the principle, Bingham LJ ruled that

> Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary mens rea and actus reus of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.[81]

Since the assumption in this case appears to have been that *Caldwell* recklessness, rather than gross negligence, was the appropriate mental element for manslaughter,[82] it is possible that Smith and Hogan's argument[83] might be more successful in a case of gross negligence manslaughter. This would allow elements of negligence which were present in different parts of a corporation to be aggregated so that the corporation could be convicted of gross negligence manslaughter if the combined sum of the negligence present in the corporation amounted to gross negligence.

4.36 However, a recent judgment of the Divisional Court suggests otherwise. *Seaboard Offshore Ltd v Secretary of State for Transport (The Safe Carrier)*[84] was concerned with an offence contrary to section 31 of the Merchant Shipping Act 1988, which provides:[85]

> (1) It shall be the duty of the owner of a ship to which this section applies to take all reasonable steps to secure that the ship is operated in a safe manner... .

[80] (1989) 88 Cr App R 10.

[81] (1989) 88 Cr App R 10, 16-17.

[82] See the coroner's direction to the jury, cited by Bingham LJ at (1989) 88 Cr App R 10, 14; and also Turner J's ruling in the *P&O* case, discussed at paras 4.38-4.44 below.

[83] See para 4.34 above.

[84] [1993] 1 WLR 1025. The defendant company has been granted leave to appeal to the House of Lords: see [1993] 1 WLR 1439.

[85] This section was brought into force as a result of the findings of the Sheen inquiry into the Zeebrugge disaster: MV Herald of Free Enterprise: Report of the Court No 8074, Department of Transport (1987).

(3) If the owner of a ship to which this section applies fails to discharge the duty imposed on him by subsection (1), he shall be guilty of an offence... .

The court was prepared to assume that this section imposed an absolute duty on Seaboard Offshore Ltd, the charterers of the vessel in question; in other words, that it was not necessary to prove any criminal state of mind on the part of the company.[86] To that extent, the offence is similar to the offences which were the subject matter of the nineteenth century railway cases discussed at paragraphs 4.7-4.8 above.

4.37 However, there the similarity ends, since the court was not prepared to find that the offence under the Merchant Shipping Act 1988 imposed vicarious liability on the company, in the absence of a clear indication that this was the intention of the legislature.[87] Absent vicarious liability, the court applied the principle of identification (the *Tesco* principle) to hold that the duty imposed by the statute "must be performed by those who manage the shipowning business of the company".[88] The fact that the vessel had sailed without an adequately instructed chief engineer could not therefore lead to a conviction of the company of this strict liability offence (and, *semble*, a fortiori, of an offence of negligence) unless it could be shown that the failure was attributable to a sufficiently senior employee, "one who engages the liability of the company".[89] Corporate liability therefore still appears to be parasitic upon the individual fault of a (probably very) senior officer, or two or more such officers acting together, as in *Tesco*.

The "obviousness" of the risk in the prosecution of P&O European Ferries (Dover) Ltd

4.38 It has been seen[90] that the prosecution against P&O European Ferries (Dover) Ltd was terminated when Turner J directed the jury that there was no evidence upon which they could properly convict six of the eight defendants of manslaughter.[91] Because of the rejection of the "aggregation" approach,[92] the company could only be convicted if an individual who "could properly be said to have been acting as the embodiment of the company"[93] was also guilty. In reaching his decision about the individuals, Turner J

[86] [1993] 1 WLR 1025, 1029H.

[87] *Ibid*, at pp 1033E-1034E.

[88] *Ibid*, at p 1034G.

[89] *Ibid*, at p 1035G.

[90] At para 4.31 above.

[91] *R v Stanley and others* 19 October 1990 (CCC No 900160).

[92] See para 4.31 above.

[93] *R v Stanley and others* 19 October 1990 (CCC) transcript p 2A.

applied what was, in the period between *Seymour*[94] and *Prentice*,[95] thought to be the ruling law for manslaughter, the recklessness test of *Caldwell* and *Seymour*.[96] He said:

> Before any of these defendants...could be convicted..., it was necessary for the prosecution to prove as against each such defendant not just one or more of the failures alleged against them in the indictment, but that - and this is the nub of the present situation - such failures were the result of recklessness in each defendant, in the now legally approved sense that they either gave no thought to an obvious and serious risk that the vessel would sail with her bow doors open, when trimmed by the head, and capsize, in circumstances unknown to shipboard management, or, alternatively, that if thought or consideration to that risk was given, each defendant, nevertheless, went on to run it.[97]

4.39 There was insufficient prosecution evidence to justify a finding that the risk of the vessel putting to sea with her bow doors open was "obvious" within the *Caldwell/Lawrence* definition. The appropriate test of "obviousness" in this case was:

> ...what the hypothetically prudent master or mariner or howsoever would have perceived as obvious and serious.[98]

This formulation was not disputed by the prosecution, and it was undoubtedly the correct approach to take since an ordinary person, with no experience of shipping, could not be expected to perceive this possibility as an obvious risk in an unfamiliar and complex system.

4.40 Turner J rejected the prosecution argument that the test should operate in a similar way to the test of foreseeability employed in cases of civil negligence,[99] so as to allow the jury to infer that the risk of the ship sailing with her bow doors open was obvious from the very fact that the safety system in place was defective and had allowed that eventuality to occur. Referring to *Andrews*, he emphasised that recklessness in manslaughter was intended to be more culpable than ordinary civil negligence: the criterion of reasonable foreseeability of the risk was not appropriate.[100] Instead, it was necessary to show that the risk was "obvious" in the sense that it would actually have

[94] [1983] 2 AC 493.

[95] [1993] 3 WLR 927.

[96] See paras 3.99-3.104 above.

[97] *Ibid*, pp 2H-3C.

[98] *R v Stanley and others* 10 October 1990 (CCC), transcript p 18F.

[99] *R v Stanley and others* 10 October 1990 (CCC), transcript p 8A.

[100] *R v Stanley and others* 10 October 1990 (CCC), transcript pp 19D-E, 22D-E.

occurred to a reasonably prudent person in the position of the defendant. What was required was

> ...some evidence upon which the jury, being properly directed, can find that the particular defendant failed to observe that which was "obvious and serious", which words themselves convey a meaning that the defendant's perception of the existence of risk was seriously deficient when compared to that of a reasonably prudent person engaged in the same kind of activity as that of the defendant whose conduct is being called into question.[101]

4.41 The prosecution evidence did not go far enough on this issue. It consisted of the testimony of a number of ships masters who were, or had been, in the employment of the defendant company, who all said that it had not occurred to them that any risk existed, let alone that it was an obvious one.[102] This evidence alone would not have been fatal. Indeed, it might even have advanced the prosecution case against the defendant company since it supported the allegation that no-one in the company had given any thought to the risk, within the first limb of *Caldwell* recklessness. However, the prosecution was not able to prove through the testimony of witnesses from outside the defendant company that the risk was "obvious". Turner J referred to the evidence of witnesses from other shipping lines:

> ...masters who may speak as to the practice adopted on various of their ships. I do not understand that the statements of any of these witnesses condescend to criticism of the system employed by the defendants in this case as one which created an obvious and serious risk, except to the extent that any legitimate deduction may be made from the fact that they took precautions other than those employed by any of these defendants.[103]

4.42 For these reasons the prosecution against the ferry company failed, despite the findings of a judicial enquiry, in the Sheen Report,[104] that:

> ...a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company [than the Master, Chief Officer, assistant bosun and Captain Kirby]. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question; What orders should be given for the safety of our ship? The directors did not have any proper comprehension of what their duties were.

[101] *Ibid*, at p 24B-D.

[102] *Ibid*, at pp 16G-17D.

[103] *Ibid*, at p 17D-F.

[104] MV Herald of Free Enterprise: Report of the Court No 8074, Department of Transport (1987).

> There appears to have been a lack of thought about the way in which the *Herald* ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness... .[105]

4.43 However, even if Turner J had had the benefit of the analysis of the Court of Appeal in *Prentice*, and had approached the issue of individual liability on the basis of gross negligence rather than of *Caldwell* recklessness, it seems likely that he would have reached the same conclusion. The dominant test remained the test set out in *Bateman*, of doing something which no reasonably skilled *doctor* would have done.[106] On this approach, based as it is on the practices of the relevant profession or industry, it would have been difficult to prove that the mode of operation of this ship, although not that of other companies, fell seriously below prevailing standards.[107] Whether an exclusive concentration on the standards of the industry in question is a helpful approach is a matter which we will consider in Part V of this Paper.

4.44 Evidence of the type adduced before Turner J would also present difficulties to the prosecution even if, in the case of a corporate defendant, it were possible to apply some version of the aggregation approach, and to look more widely, and not merely at the responsibility of individuals. The fact that none of the witnesses saw the method of operating the vessel as creating an obvious and serious risk of disaster might be thought to suggest that the company's attitude and method of organisation, which had been so seriously criticised by the Sheen enquiry,[108] were not unique within the industry.

4.45 In the whole of this discussion, however, it must be remembered that the law of manslaughter is concerned with the conviction of persons or corporations for serious criminal offences, and not with mere administrative or commercial censure. This contrast plays an important role in the consideration of possible reforms of the law to which we turn in the next Part of this Paper.

[105] *Ibid*, para 14.1.

[106] (1925) 19 Cr App R 8, 14.

[107] See for instance the summary of the evidence quoted at para 4.41 above.

[108] See para 4.42 above.

PART V

OPTIONS FOR REFORM

It will be apparent from the discussion of the present law that we regard the most important points of difficulty in relation to involuntary manslaughter are twofold. The first is whether there ought to be a law of "gross negligence" manslaughter and what its limits should be. The second concerns the extent to which corporations should be liable under that law. Most of this Part is devoted to those issues. We must, however, first deal with three other subordinate issues: the future of unlawful act manslaughter; manslaughter by subjective recklessness; and motor manslaughter.

A. Unlawful act manslaughter

5.1 We realise that there may be many who will be surprised that we regard this as a subordinate issue, from the point of view of its difficulty and importance, and we are certainly conscious that it is a subject on which people may have strong views. The idea that if somebody causes death by accident, without the requisite mens rea to convict him of serious crime, he may nevertheless be found guilty of manslaughter is such a strongly established part of our law that it may seem odd to some of our readers that at present we are of the provisional view that it should be abolished.

5.2 A study of Thomas's Current Sentencing Practice[1] illustrates the type of offence which now leads to a conviction of unlawful act manslaughter: manslaughter arising out of fights; by stabbing; involving the use of a firearm; in the course of burglary; in the course of robbery; of a young child; by setting fire to buildings; by injection of drugs; in the course of a sexual orgy. In all these cases the defendant, by definition, did not intend to kill or cause really serious harm: if he had, he would have been convicted of murder. If he was aware of a risk that death would occur if he acted in a certain way and it was unreasonable, having regard to the circumstances known to him, to take the risk in question,[2] then his case will be covered by the offence of manslaughter by subjective recklessness which is discussed in paragraphs 5.16-5.21 below. If, too, his behaviour was one of such recklessness (in a *Caldwell* sense) or really culpable negligence that he ought to be convicted of a serious crime if death results from it, then the relevant policy considerations will be discussed in paragraphs 5.30-5.71 below.

5.3 If for policy reasons such people should be convicted of manslaughter, an offence which carries a maximum sentence of life imprisonment, then subject to the views expressed on

[1] Thomas, *Current Sentencing Practice* (1982), incorporating Release 26, July 1993.

[2] See the definition of "recklessly" in clause 1(b) of the Draft Bill in Legislating the Criminal Code: Offences against the Person and General Principles (Law Com No 218) and the discussion in paras 8.1-10.4 of that report.

consultation and the opinions expressed in the House of Lords in *Adomako*,[3] we can see a good prospect of a clear principled statement of the law, codified in statutory form, emerging as a result of this study. Many cases of those who are now convicted of "unlawful act manslaughter", for example the dreadful recent case of *Barrell*,[4] would undoubtedly fall to be considered under a law of manslaughter which embraced very serious cases of negligent conduct.

5.4 Although we have considered the possibilities very carefully we can at present see no prospect of being able to devise any clear, principled statement of law based on concepts of unlawful act manslaughter. As we have explained in Part II, this is an offence which is founded not on any supportable principle or policy but has survived from the unsupportable doctrine of constructive liability, whereby liability for a serious crime is constructed out of liability for a lesser crime. And we have shown in Part II the anomalies, uncertainties and difficulties which still exist notwithstanding all the efforts of the judges in the last sixty years to instil into it more acceptable elements, such as the requirements that the unlawful act must be an objectively dangerous one and that mere negligence will not suffice.

5.5 We can see no rational principle under which someone who causes death through carelessness when at the wheel of a motor-car, which is itself a potentially lethal instrument,[5] or someone who causes death through carelessly overlooking regulations devised to protect passengers' safety on the railways, should not be liable to be convicted of unlawful act manslaughter, whereas a burglar who does an act which might be seen objectively as likely to cause some harm[6] should face liability for this serious offence.

5.6 In short, successive attempts to limit, explain or justify the offence of unlawful act manslaughter have only caused disagreement both here and in other common law jurisdictions. Our provisional view,[7] as we have already said, is that it would be very much better to abolish this type of manslaughter altogether, as the Criminal Law Revision Committee recommended. If, then, the act or omission which caused the death was of the seriously negligent or objectively reckless type which we discuss later in this Part, then manslaughter will remain the appropriate verdict. If, on the other hand, it is not, then the defendant should be liable to be convicted for the unlawful act he did in fact commit, like the motorist who kills by careless driving. The addition of a conviction for an offence of

[3] See paras 1.23 and 3.154 above.

[4] *Barrell* [1992] 13 Cr App R(S) 646. The dead body of a 14-year-old rent boy was found in undergrowth in Essex. His anus was extensively dilated, and the diameter of the objects which has been inserted in it was obviously quite extensive. He had died at the hands of a number of men in the course of a cruel sexual orgy, and four of them were convicted of manslaughter.

[5] See Lord Lane CJ in *Boswell* [1984] 6 Cr App R(S) 257, 259.

[6] As in *Watson*, see para 2.36 above.

[7] See paras 2.53-2.56 above.

homicide, where the death was entirely unforeseeable and accidental, adds nothing to the powers which ought to be available to the court in a rational system of punishment.[8]

5.7 We are, needless to say, anxious to hear from anyone who disagrees with this provisional view. We would particularly invite them to state with some clarity what form they believe the law of unlawful act manslaughter should take, bearing in mind all the difficulties to which we have drawn attention in Part II above.

5.8 Despite our provisional view that unlawful act manslaughter should be abolished, we recognise that there is a strong feeling in certain sectors of the general public, a feeling which may be fuelled more by emotion than by reason, that where a person has caused death by an act of violence, the fact that a death has been caused requires the criminal law to deal more severely with the accused. We seek the views of consultees who may have practical experience of the strength and prevalence of this feeling as to whether the criminal law should continue to be influenced by it.

5.9 In case consultees do think that the strength of this feeling should be acknowledged by the criminal law, we put forward here two, alternative, options for the reform of the law, on the assumption that unlawful act manslaughter is to be abolished.

5.10 The first option is the abolition of unlawful act manslaughter without any form of replacement. This option would accord with a very important principle of criminal law, and one which has informed much of our law reform work for many years, that

> ...it is unjust, in the absence of very pressing reasons of practicality or social protection, to punish people for the results of their conduct which they neither intended nor foresaw.[9]

This quotation is taken from our recent report on non-fatal offences against the person. In that report and in the preceding consultation paper,[10] we criticised the present offences under sections 20 and 47 of the Offences against the Person Act 1861, because they are defined solely in terms of the *effect* of the injury caused. We recommended that they should be replaced by offences defined in terms of the harm which the defendant intended or foresaw causing.

5.11 Another argument in support of this option is that the law already has adequate weapons with which to deal with an act of violence. Thus, as we observe in paragraph 5.6 above,

[8] If the courts' powers of sentencing for certain types of violence are believed to be inadequate (see *Silver and Gosling* (1982) 4 Cr App R(S) 48; *Ruby* (1987) 9 Cr App R(S) 305); then they should be increased, and recourse should not be had to the vagaries of sentencing for unlawful act manslaughter, where punishment is imposed for the *result* of the violence, and not for the criminal culpability involved.

[9] Law Com No 218, para 21.

[10] LCCP No 122, paras 7.28-7.30 and 7.32-7.33.

if the act of violence was seriously negligent or reckless, then manslaughter will remain the appropriate charge. But if this element of negligence or recklessness is absent; if, for instance, A assaults B, say by pushing him over in the street, and B dies as a result because he has an "eggshell skull" which quite unpredictably is shattered in the fall; then A should be punished for the assault; or for an offence of inflicting injury, if he intended or was aware that some injury would result. This is the conclusion which was reached by the Criminal Law Revision Committee in 1980: we cite their views in this connection in paragraph 2.52 above.

5.12 The second option is to abolish unlawful act manslaughter and to put in its place an offence of "causing death". We provisionally suggest that this offence would be based on the offence of intentional or reckless injury set out in clause 4 of the Criminal Law Bill published with Law Com No 218, with the additional element that death was caused; in other words:

> A person is guilty of an offence if he causes the death of another intending to cause injury to another or being reckless as to whether injury is caused.

We seek the views of consultees on the advisability of creating an offence of this type, on the formula which we have provisionally suggested, on the question of the penalty which would be appropriate for such an offence, and on an appropriate name for it.

5.13 This option is less attractive on the grounds of principle referred to in paragraph 5.10 above, but it would satisfy the emotional argument that the law should not disregard the fact that the accused has caused death. This feeling, of course, informs the whole of the law of involuntary manslaughter, and in paragraphs 5.31-5.35 below we discuss similar issues of principle in more general terms.

5.14 The form of offence set out in paragraph 5.12, on which we seek readers' opinions, is based on principles of constructive liability and is therefore open to criticism on similar grounds as unlawful act manslaughter. However, because it is limited to those cases where the accused intended to cause injury or was (subjectively) reckless as to whether injury was caused, it would have certain advantages over unlawful act manslaughter. First, it would obviously be of much narrower scope. Secondly, the type of behaviour and mental element which would attract added penalty if death resulted would be very clearly defined. Finally, it would be slightly more subjective than unlawful act manslaughter because it would at least require that the accused intended to cause some injury or was aware of a risk of this occurring.[11] It may be of interest to note, also, that the criminal codes of both France[12] and Germany[13] contain offences of this kind.

[11] See para 2.33 above.

[12] Nouveau Code Penal (1993), Art 222-7, refers to an assault which unintentionally results in death.

[13] German Criminal Code (1975), para 226, refers to an offence of bodily harm followed by death.

However, we are not aware of any similar offence to be found in the jurisprudence of any of the principal common law jurisdictions.

5.15 As we observed in paragraph 5.12 above, we seek the views of those readers who favour the introduction of an offence of this type on the question of the level of penalty which it should attract. This question is of great difficulty, since it calls for the legislature to put a value, in terms of punishment, on a life accidentally lost as a result of the defendant's acts. The offence of intentionally or recklessly causing injury under clause 4 of the Criminal Law Bill published with Law Com No 218, which has the same mental element as the causing death offence which we provisionally suggest in paragraph 5.12 above, has a maximum penalty of three years. Since the degree of culpability on the part of the accused would be the same for both these offences, it might be thought that both should carry the same maximum sentence. However, those readers who support the creation of a causing death offence may think that this policy would defeat the object of having this separate offence, and we seek their views on this subject.[14] We also seek views on an appropriate name for this offence, since the name "manslaughter" is inappropriate.

B. Manslaughter by subjective recklessness

5.16 We described in paragraph 3.169 above how, in 1985, there was an amendment to what had previously been thought to be the law of murder. It had been thought that recklessness as to death or grievous bodily harm sufficed for conviction of that offence. In *Moloney*,[15] however, the House of Lords decided that, in future, to be guilty of murder the accused had to intend, and not merely to foresee, death or grievous bodily harm as the result of his acts.

5.17 The House of Lords, no doubt, assumed that the forms of conduct which had been removed from the law of murder would fall into the law of manslaughter. The no doubt valid assumption was made that a law stated in terms of *objective* recklessness (as the law of manslaughter, following *Seymour*, then clearly was) would necessarily embrace acts of *subjective* recklessness.

5.18 However, the law in *Seymour* has now been further reviewed in *Prentice*, and the use of the terminology of "recklessness" in manslaughter has been strongly discouraged.[16] In addition, that law itself is subjected to further review later in this Paper. We must therefore make clear our provisional view that there ought to be a separate and particular category of reckless manslaughter, which will embrace the cases which until 1985 would have been cases of murder.

[14] See n 117 to para 2.52 above for a dictum of Lord Lane CJ that there is an element in the sentence imposed at present in such a case which represents the fact that death has ensued. The questions now to be addressed are what should that element be, on what principles should it be assessed and what is the justification for it.

[15] [1985] AC 905.

[16] See para 3.141 above.

5.19 We so propose on the assumption that it will not be doubted that those who kill while acting subjectively recklessly as to the death of other people should be guilty of an offence; just as it is not doubted that those who injure others when subjectively reckless as to such injury should be guilty of an offence.[17] Manslaughter is the obvious categorisation of such conduct.

5.20 We also consider, although with less certainty, that one who is reckless merely as to serious injury to other persons, but who in fact causes death, should be guilty of manslaughter. Although there has been criticism of the inclusion within the mens rea of a homicide offence of a state of mind directed to something less than death, and modifications have been suggested, these have been made in the context of *murder*,[18] and the same arguments do not apply in the case of manslaughter. It is already the law that states of mind that involve no subjective element at all directed to death or injury, which is the case with "gross negligence", can suffice for liability for manslaughter, and in the discussion below we certainly entertain the prospect of purely objective fault continuing to suffice for such liability. If therefore (but perhaps only if) that approach commends itself, liability based on actual awareness of the possibility of serious injury would seem to follow a fortiori.

5.21 We therefore propose a category of (subjective) reckless manslaughter in terms of a person causing the death of another while being reckless whether death or serious personal injury would be caused.[19] In assessing the second limb of that proposal readers will wish to be bear in mind the points raised in paragraph 5.20 above. This "recklessness" would, unlike that debated in *Andrews* and subsequent manslaughter cases, be unequivocally subjective recklessness, to be defined in the terms adopted in the Draft Code and in clause 1(b) of our Report on Offences against the Person,[20] that the accused was aware of the risk that death or serious injury would occur, and unreasonably took that risk.

[17] As provided in cls 3 and 4 of the Criminal Law Bill presented in the Report on Offences against the Person (1993) Law Com No 218.

[18] Criminal Law Revision Committee, Fourteenth Report (1980) recommendation 1(b): the mens rea of murder in terms of intent to cause serious injury to be limited to cases where the accused knew there was a risk of causing death thereby. This proposal was also adopted by the House of Lords Select Committee on Murder (the Nathan Committee: HL Paper 78-I, July 1989), at para 195 of their Report. The government did not adopt the recommendations of either committee: see Earl Ferrers, *Hansard* (Lords) vol 512 col 452 (30 November 1989).

[19] This formulation follows the terms of cl 55(c)(ii) of the Draft Code: see Law Com No 177, vol 1, p 67.

[20] Law Com No 218 (November 1993). We there recommend the incorporation of the principle laid down in *Majewski* [1977] AC 443, that a defendant is to be treated as having been aware of a risk of which he would have been aware if sober: see Law Com No 218, paras 43.1-44.9, 46.1-46.6, and clauses 21 and 35 of the draft Bill. We envisage that a similar provision would apply to reckless manslaughter. We are currently reviewing the law concerning the effect of intoxication on criminal liability: see LCCP 127 (February 1993).

C. Motor manslaughter

Introduction

5.22 In paragraphs 3.156-3.167 above we described how the law of manslaughter while driving a motor vehicle is now isolated from the rest of the law of gross negligence manslaughter by the accident of precedent which prevented its being critically reviewed, with the rest of the law of gross negligence manslaughter, in *Prentice*. We also described how the retention in motor manslaughter of the *Lawrence/Seymour* test for liability undermines the objective of the North Committee that there should be a graded hierarchy of road traffic offences involving the causing of injury or death, with manslaughter at the top of the list, reserved for conduct of the most serious, dangerous and irresponsible nature.

5.23 We do not think that it can be sensible for the present law to remain untouched. The law, as set out in the authorities, is shockingly severe,[21] and it only underlines the unsatisfactory nature of that law for the court which formulated it to add that prosecuting authorities may be expected to use it only in very grave cases.[22] Nor is it necessary for the protection of the public, or for any other demonstrative reason, to have special rules for *manslaughter* as a means of controlling and punishing behaviour on the roads since there is a specific code of criminal law applying to that activity. This code should be able adequately to deter and punish any misconduct, however bad the driving and however dreadful its results.

5.24 Needless to say we invite comment from any reader who considers that the law as stated in *Seymour* and *Kong Cheuk Kwan* should remain unamended. However, we provisionally propose two possible measures of reform. The first makes the causing of death by bad driving solely a matter of road traffic law. The second retains an offence of manslaughter in that context, but in terms different from the present.

The disapplication of manslaughter to killings by use of motor vehicles

5.25 The effect of such a policy would be to exclude liability for manslaughter from cases in which the death was caused by bad driving. The statutory offence of causing death by dangerous driving would then be the only available charge in such a case. There is a strong argument in favour of such a policy, despite the fact that it did not commend itself to the North Committee.[23] The maximum penalty for causing death by dangerous driving is now ten years,[24] and it is hard to see that any case of *objectively* reckless manslaughter would merit a greater penalty than that; and, in an extreme case, the offence of manslaughter by subjective recklessness, discussed in paragraphs 5.16-5.21 above, would be available. Moreover, the criticisms of "recklessness" as it applied to the

[21] See para 3.105 above.

[22] See Lord Roskill in *Seymour* [1983] 2 AC 493, 503G, cited in n 172 to para 3.103 above.

[23] See para 3.163 above.

[24] Road Traffic Offenders Act 1988 Sch 2, as amended by the Criminal Justice Act 1993 s 67(1).

statutory offence of causing death by reckless driving, which are catalogued in the North Report,[25] apply equally to motor manslaughter, since the ingredients of the two offences were exactly the same.

5.26 It is in truth very difficult to see how under the law as it now stands a prosecutor could justify a charge of manslaughter. We suggest that it would be better to recognise that reality by abolishing what may prove to be an otiose offence.

The reversal of Seymour

5.27 An alternative approach would be to take the step that the Court of Appeal was unable to take in *Prentice*,[26] and reverse the decision in *Seymour*, which held that *Caldwell* recklessness was the mental state required for motor manslaughter.[27] There is a persuasive historical argument for such a policy, since the very case on which the Court of Appeal relied as authority for the adoption of a gross negligence test in *Prentice* was *Andrews*, itself a case of motor manslaughter. As was pointed out in paragraph 3.37 above, Lord Atkin in *Andrews* only suggested the word "reckless" as a useful way of describing gross negligence; but the word "recklessness" was then taken up by judges in subsequent cases, and the true nature of the *Andrews* gross negligence test became obscured.

5.28 If no other alterations were made to the general law of manslaughter, the proposed reversal of *Seymour* would merely return the law of motor manslaughter to the position which was thought to obtain in *Andrews*, namely that motorists who kill are to be judged by the same test as anyone else charged with manslaughter. We propose below, however, that the general law of manslaughter should also be reviewed. Consultees, therefore, will wish to consider the possible retention of manslaughter in the case of killing by motor vehicle in the context of their view of how the general law of manslaughter should be expressed.

5.29 If the special rule of *Seymour* were to be reversed, the law of manslaughter would at least be potentially useable in cases of killing by driving.[28] We invite views, however, on the question whether any case is likely to arise where the opprobrium, and the penalty, provided by the offence of causing death by dangerous driving[29] are insufficient to mark what is undoubtedly society's very important interest in dealing with bad driving that results in death.

[25] See paras 3.160-3.161 above.

[26] See para 3.133 above.

[27] See para 3.103 above.

[28] Contrast the position under the present law that is suggested in para 5.26 above.

[29] See para 5.25 above.

D. A general law of manslaughter

Introduction

5.30 In this section we review what, if anything, should be the law of manslaughter, in addition to the liability based on subjective recklessness which was discussed in paragraphs 5.16-5.21 above. In the following section we discuss the specific application of that law to corporations. The discussion involves some fundamental questions, not yet touched on in this Paper, as to the proper scope and purpose of this part of the criminal law. Those questions are raised in the paragraphs which follow.

Should there be a law of manslaughter at all?

5.31 Involuntary manslaughter is exceptional, at least amongst crimes of any seriousness, because it depends so strongly on the particular result caused by the defendant, rather than upon his conscious intention to produce, or awareness that he might produce, that result. It might be argued that, as in the general run of serious offences, liability should depend on the defendant's awareness of the possible result of his conduct, and that therefore the crime of manslaughter should go no further than the category of manslaughter by subjective recklessness described above. In particular, it might be thought irrational that conduct which otherwise would not have attracted any criminal sanction should become criminal, and seriously criminal at that, when death happens to result: just as, in unlawful act manslaughter, the law has been criticised as illogical because it is the accident that death has resulted which makes the accused guilty of manslaughter as opposed to some lesser offence.[30]

5.32 We invite comment on whether, for the reasons just indicated, there should be no law of manslaughter at all. There are, however, some countervailing considerations.

The special position of homicide

5.33 First, and most obvious, the causing of *death* is a serious and significant matter, quite different in nature from any other consequence with which the law has to deal. As Lord Mustill put it, in the different but relevant context of the rule that intentional killing with the consent of the victim is always and absolutely murder,

> ...the arguments in support are transcendental... . Believer or atheist, the observer grants to the maintenance of human life an overriding imperative.[31]

5.34 That such beliefs are strongly held is perhaps demonstrated, in the present context, by what appears to be a widespread feeling that criminal sanctions should be applied, or at least should be potentially available, in cases where deaths are caused by the misoperation of public services such as, in particular, transport services. In the same way, there has been little dissent about the provision of special offences of causing death by the offences

[30] See Lord Parker CJ in *Creamer* [1966] 1 QB 72, 82C-D, cited in para 2.1 above.

[31] *Brown* [1993] 2 WLR 556, 588G-H.

of reckless or dangerous driving which have been enacted at various times. As we mentioned in Part I above, this resurgence of public concern since 1980 was one of the reasons that led us to conclude that we could not, without further serious consideration, adopt the recommendation of the Criminal Law Revision Committee in 1980 that the crime of negligent manslaughter should be abolished.

5.35 Irrational or not, therefore, the existence of special offences related to the causing of death touches a deep concern, and the law must take this concern very seriously. It is, however, of prime importance to consider whether the terms of any offences which are created to meet that concern are directed at, and limited to, the causing of death in circumstances which are truly and properly culpable.

Accidental and non-accidental death

5.36 Secondly, it is important to recognise that, although the present law of gross negligence manslaughter does not depend on subjective appreciation of the likelihood of death, or of serious injury, it does not necessarily impose liability in a way which is truly erratic or capricious.[32] In the case of unlawful act manslaughter, it really is the *accident* of death occurring which creates liability.[33] But if one considers, for instance, the medical negligence case of Dr Adomako,[34] it would be an abuse of language to describe either the patient's death or the doctor's responsibility for it as *accidental*.

5.37 In such a case, the death has occurred as the result of the misperformance of a duty or function which is peculiarly that of the defendant. He has undertaken this duty or function voluntarily, and indeed for reward, and as such special functionary he has no excuse for not appreciating the consequences of his action or inaction. Such events must necessarily raise serious questions as to the responsibility and liability of the person who caused the death.

The function of the criminal law

5.38 It may nonetheless be said that, however culpable in general terms the conduct may be on the part of such a doctor, or, to take another example, of an electrician who irresponsibly and thoughtlessly does his work when connecting up a domestic central heating or railway signalling system, that culpability should not be met by *criminal* sanctions. The criminal law, with the state punishment and the public stigma which attaches to it, should be reserved for conscious wrongdoing. On this line of argument, mere thoughtlessness or incompetence in doing one's work, however extreme its nature or serious its results, should be met only by administrative sanctions, or by the prohibition of the person concerned from further practising the occupation or activity

[32] The law as proposed in *Seymour* is much more vulnerable to such an objection, as described for instance in para 3.105 above. This is a prime reason why that law has been subjected to serious revision in *Prentice*.

[33] See n 30 to para 5.31 above.

[34] One of the cases on appeal in *Prentice*, and described in para 3.150 above.

which gives him the opportunity to wreak havoc, even when that havoc consists of the death of his fellow citizens.

5.39 We invite comment on the propriety of a law of manslaughter in the light of these fundamental considerations. For our part, however, we doubt whether the matter can be resolved simply by reference to these first principles. By creating many crimes of strict liability the criminal law undoubtedly does prohibit and punish a wide range of conduct where the wrongdoer is neither conscious of his failings nor even (provably) negligent. It is not generally thought to be a misuse of the criminal law to mark the requirements of society, and to encourage the taking of precautions to avoid detrimental consequences, by the creation of such offences. And as we have seen, in the particular and notoriously dangerous area of road traffic, it is widely thought necessary and right to create crimes, even crimes of causing death, which do not turn on conscious risk-taking.

5.40 In our view, therefore, these considerations of the proper role of the criminal law point not so much to objections on grounds of principle to the very existence of a law of manslaughter as to the need to treat such a law as the last resort in punishing dangerous conduct, and thus to great caution in delimiting the terms of that law. If the law of manslaughter is expressed in too wide terms, it will be in danger of capriciously extending to cases which are not ones of really serious fault. It will also, more generally, be in danger of being ignored, as inappropriate for use in most of the cases to which it theoretically extends. This latter phenomenon was indeed the likely outcome, forecast by the court itself, of the wide rule which was adopted in *Seymour*.[35]

5.41 These dangers were foreseen by the Criminal Law Revision Committee in its discussion of "gross negligence" manslaughter in 1980:

> ...sometimes the jury may not be able to find more than that the defendant was extremely foolish; and although the foolishness may amount to gross negligence we do not think that it should be sufficient for manslaughter in the absence of advertence to the risk of death or serious injury. It seems that in fact prosecutions falling exclusively under this heading of manslaughter are very rare, and bear no relation to the number of accidental deaths on the roads, in factories, in construction industries, in the home, and so on. If the law of manslaughter by gross negligence were strictly enforced, many drivers, employers, workmen and parents would be in the dock on this charge.[36]

5.42 The force of these conclusions, which led the committee to recommend that the law of gross negligence manslaughter should simply be abolished, was strongly reinforced when, three years later, and quite contrary to anything prefigured in the committee's report, or

[35] See n 172 to para 3.103 above.

[36] Fourteenth Report, para 121.

in the expectation of observers, in *Seymour* and *Kong Cheuk Kwan*[37] the law of manslaughter was greatly extended beyond the limits which the Criminal Law Revision Committee had thought to be already dangerously wide.

5.43 The Criminal Law Revision Committee's warning behoves us to proceed with caution. In the proposals which we provisionally make below, for critical comment, we have been strongly influenced by the consideration that, if there is to be a crime of negligent manslaughter at all, it will neither achieve its social purpose nor operate fairly unless it is kept within strict bounds.[38] We consider, however, again subject to the views of consultees, that there does exist a legitimate place for a general law of manslaughter, and that it should not be limited to conduct which *consciously* risks death or injury.[39] We set out the possible terms of such a law, again for critical comment, in the next section. We are aware that by the time we come to report we will have the benefit of the opinions of the House of Lords in the case of *Adomako*,[40] and that our final views are likely to be influenced by the outcome of that appeal.

E. A new start

The nature of the offence

5.44 The crime of manslaughter is a last resort, by which we mean that it should be available only when other sanctions which already exist against the behaviour complained of seem inappropriate, whether these be civil negligence actions, professional condemnation and disqualification, health and safety legislation, or the road traffic laws. It also does, or should, apply only to behaviour which is seriously at fault. These features of the offence in our view carry the following implications.

5.45 First, because the law is designed to target cases which are considered by society to be particularly serious, in which the common factor is not any particular activity but the causing of death, that law should so far as possible set a common standard for all cases in which it applies. We have already indicated that we do not think that there ought to be a separate offence of "motor" manslaughter. Nor, equally, should there be "medical" manslaughter or "electrician's" or "ship captain's" manslaughter. The application of the test may vary with the facts, but the test itself ought to be the same in all cases.

[37] See paras 3.105-3.112 above.

[38] We respectfully suggest that the need for such limitation is demonstrated by the position in which the law of New Zealand finds itself. As described in para 3.46 above, a very severe law, couched in terms of mere civil negligence, is sought to be mitigated by the hope that juries will not often convict and, if they do, a purely nominal penalty can be imposed. We cannot accept that this degree of uncertainty, and hazard for defendants, is a proper way of formulating offences of *homicide*. Most other jurisdictions have equally found such a rule unsatisfactory: see paras 3.48-3.58.

[39] As to which, see paras 5.16-5.21 above.

[40] See para 3.154 above.

5.46 Second, the general test is going to be difficult to state above a fair level of generality. As the Court of Appeal said in *Prentice*:

> The range of possible duties, breaches and surrounding circumstances is so varied that it is not possible to prescribe a standard jury direction appropriate in all cases.[41]

This of course is correct. As the House of Lords emphasised in *Reid*,[42] there is a good deal of difference between stating a formula as the encapsulation of the law and using that formula without more in directing a jury. But a general formula can at least try to make clear the considerations which the jury should have in mind and the type of standard which they have to set. This is not, in our view, achieved either by talk of (undefined) "recklessness", or by a simple resort to "gross" negligence: however much the latter formulation, reasserted in *Prentice*, improved on the law which had immediately preceded it.[43]

5.47 Third, any formula will leave a good deal of judgment to the jury. This, however, is not only inevitable but, in our view, also right. When the basic question is whether the conduct, although not involving intentional wrongdoing, is so bad in every other respect that society thinks that it must be punished, the arbiter at the end of the day has to be the cross-section of society which finds itself in the jury-box. Once it has been decided to have such a crime of last resort, it cannot of its very nature be too closely tied down by definitional rules. In this respect, therefore, the early and classic account of negligent manslaughter still has considerable force:

> ...the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others to amount to a crime against the State and conduct deserving punishment.[44]

As a *definition*, this formula might be, and has been, criticised on grounds of circularity.[45] But as a statement of practical reality it would seem to have a good deal of force.

5.48 The final consideration relates to the very great difficulties which have been caused in the law of manslaughter in the last ten years. First there was the revolution in *Seymour*,

[41] [1993] 3 WLR 927, 937D.

[42] [1992] 1 WLR 793: for the present point, see n 265 to para 3.156 above.

[43] See in particular paras 3.147-3.149 above.

[44] Lord Hewart CJ in *Bateman* (1925) 19 Cr App R 8, 11-12: cited *passim* through the rest of this Paper.

[45] See para 3.36 above.

which was followed by a period of uncertainty as to the exact content of the rules. Then there was the Court of Appeal's conclusion that *Seymour* had been in large part obiter, and that the statement of the law which it proposed could and indeed must be discarded if juries were not to be misled.[46] The court in *Prentice* then found itself obliged, because of the legacy of history, to set out a range of possible circumstances, or states of mind or absence of mind, which might result in a manslaughter conviction.[47] However, in actually deciding some of the cases before it, it appealed to a simpler and more general test.[48] The barriers to a simple statement of the law which are caused by its history make a new start highly desirable, and this is what the Court of Appeal itself has urged.[49] What we provisionally propose below may not differ much in effect from the law as applied in *Prentice*, but we hope that with the assistance of consultees we can use the freedom the Court of Appeal did not enjoy to state the law in a clearer and more focused way.

Manslaughter: a crime about death

5.49 In our view, the principal objection to the formulations which have been suggested to encapsulate "gross negligence" manslaughter, including those advanced by way of example in *Prentice*, is that they do not focus sufficiently on the nature of manslaughter as a crime which turns on the causing of death; or, perhaps more precisely, as a crime which has to be justified, if at all, by considerations of the sanctity and protection of life. "Gross" negligence, or (for instance) "indifference to an obvious risk of injury to health",[50] may, or in the case of the latter formulation actually do, allow a conviction in cases where the accused's fault is expressed in relation to a consequence which falls considerably short of the death for which he is blamed. In such a case, it is more than plausible to say that it is indeed the accident of death resulting that imposes criminal liability.[51]

5.50 Our main proposal, therefore, is that the unifying feature of a general law of manslaughter should be that the defendant's conduct is such that it creates a significant risk of death or (perhaps) serious personal injury resulting from it. This will focus the attention of the tribunal of fact upon the actual nature of the accused's conduct, and will test that conduct according to its propensity to threaten the outcome which in fact occurred.

[46] See para 3.141 above.

[47] See para 3.140 above.

[48] See eg para 3.149 above.

[49] See para 1.18 above.

[50] [1993] 3 WLR 927, 937E, at point (a). It will be noted that the other examples given in *Prentice* are stated simply in terms of "risk", without specifying risk *of what*.

[51] Compare para 5.31 above.

5.51 We propose that the standard should be stated in terms of *significant* - or some similar standard such as "substantial" -risk. "Risk" without more is inappropriate because it is possible to conjure up *some* risk, even a risk of death, from almost any human activity, and not least from driving a motor vehicle or practising as a doctor.

5.52 Strictly speaking, the risk should be the risk of death, since the occurrence of death is the unifying factor in the offence. But, just as in the case of manslaughter by subjective recklessness there is an argument that risk of serious injury as well as risk of death should ground liability,[52] so here, for somewhat different reasons, we submit for consideration the proposal that risk of serious injury as well as risk of death should found the offence. The reasons for this step are twofold. First, as a matter of principle, it might be thought that conduct which creates a significant risk of serious injury to others is, if it happens to result in death, sufficiently serious to be subject to special criminal sanctions. Secondly, on a practical level, risking serious injury and risking death are not very far apart, and it may be easier to deal with cases of serious misconduct if the jury does not have to be satisfied that they created a risk of *death*.

5.53 It may of course be argued that the limitation which is suggested here will not in practice be a limitation at all, because in all cases, by definition, death will have actually occurred. The jury will therefore be tempted to assume that there must have been a serious risk of what in fact did occur. We invite comment on that suggestion, but we do not agree with it. If the sequence of facts which led up to the death are considered in detail, it ought to become clear whether the patient or the passenger died through an unlikely slip or turn of events, or because of something which was likely to occur if the doctor or shipowner conducted his business in the way that he did.

5.54 It should also be noted that this approach does not depend on deciding whether the risk was "obvious". It does not therefore raise the difficulties of identifying the person to whom the risk must be so obvious.[53] We have already indicated the problems which we see in the use of this term in the *Prentice* exposition,[54] where, we suspect, it appears as a vestige of the criterion of obvious risk which was adopted in *Caldwell*. The expression is, however, highly misleading when describing *objective* liability, because the nature of the risk is to be assessed by the court or jury. Obviousness, if appropriate at all as a question, depends on whether the risk is obvious to them. The requirement that the risk should not be merely trivial, obscure or unlikely, is much more clearly conveyed by requiring that the risk should be significant or substantial.

5.55 The *nature and degree* of the risk is, however, only one aspect of question. The other aspect is whether the accused was culpable in creating or continuing that risk. In that

[52] See para 5.20 above.

[53] See, on the latter point, the discussion in *P&O* of the viewpoint from which the risk must be obvious under the *Caldwell/Lawrence* definition: paras 4.38-4.41 above.

[54] See para 3.143 above.

enquiry, amongst other issues, the question will arise whether and with what clarity the risk that he created or did not avert should have been apparent to him.[55]

5.56 The distinction between the seriousness of the risk and the culpability of the accused in respect of the risk is well illustrated by the cases of Drs Prentice and Sullman. It was not in issue that injecting vincristine into the spine creates a very substantial risk of death. Indeed, this was Dr Prentice's horrified reaction as soon as he realised what had happened.[56] The question which a court ought to decide, however, was the doctors' culpability in respect of what had happened, "having regard to all the excuses and mitigating circumstances in the case".[57] It is to this standard of culpability that we now turn.

The standard of culpability

5.57 Here again we suggest a unified test. As we have warned, this test has to be expressed with some generality. However, rather than resort to a single, vague and undefined, expression such as "gross" negligence, some attempt at least must be made to separate the elements of the accused's culpability. We therefore suggest:

1. The accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury.[58]

2. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.

5.58 The first of these requirements is somewhat formal. If the accused could not reasonably have been expected to be aware of the risk, then he could not be expected to do anything about it.

5.59 The second requirement has a number of elements.

5.60 First, the accused's conduct must fall below the standard which can reasonably be expected *of him*. That is, he is to be judged according to what might be expected of a

[55] It will be recalled that if the risk was *actually* apparent to him he will be liable, if he unreasonably ran the risk, under the category of subjective reckless manslaughter: see paras 5.16-5.21 above.

[56] [1993] 3 WLR 927, 939G.

[57] *Ibid*, at p 942G: see para 3.148 above.

[58] There will be some cases where the accused is *actually* aware of the risk but, rather than run the risk, he seeks to avoid its occurring. This is *Prentice* example (c), cited in para 3.140 above: An appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction. The only implication of this, perhaps not very common, situation for our own scheme is that the first requirement, that the accused should reasonably have been aware of the risk, will (almost inevitably) be satisfied.

doctor, train driver or, in the alternative case, ordinary citizen. There are in turn two aspects to this requirement. First, an ordinary citizen who finds himself obliged to do his best in a case which calls for professional attention, for instance a passer-by who assists at a road accident, is not expected to show anything like the skills of a professional person. He may be at some peril if he officiously intermeddles. For example, if he contemplates rewiring a house when it should reasonably have been obvious to him that failure to use professional help would create a significant risk of serious injury, then his duty may be to desist. But generally citizens who do their honest, helpful but muddled best may expect to be found to have done what was reasonably to be expected of them.

5.61 Secondly, however, where the accused acts in a way rejected by his own profession, as in the case of Dr Adomako,[59] he is likely to be found not to have acted in the way expected of him. In our view, however, the converse should not necessarily be the case. Even if a certain course of conduct is "industry practice", or is not regarded as seriously unusual by other operators in that industry, we consider that the jury must retain the right to say that, where a significant risk of death or serious injury exists, the industry's practice is just not good enough.

5.62 These latter issues were not addressed in the case which most obviously gives rise to them, *P&O European Ferries (Dover) Ltd*, because attention was focussed on the question, which had to be addressed by the law that then obtained, of whether the risk was "obvious".[60] It is fruitless to speculate how a jury might have viewed the general practice of the company, as characterised in the Sheen Report,[61] if they had been invited to apply to it a test such as that suggested here. We consider, however, that the test suggested does not exclude a critical review of the practice and attitudes of an industry. We particularly invite comment on whether this approach is valid and, if so, whether it should be made explicit in any legislation.

5.63 Thirdly, the accused's conduct must not merely fall below what is reasonably expected of him, but must fall below this standard by a substantial and significant degree. This consideration may well be better conveyed by more vernacular expressions than that just suggested.[62] What is needed is to convey the idea that the accused's conduct must fall below the expected standard by a marked and obvious distance. This is the basic idea of "gross negligence" which has been, at least to some extent, restored as the test in English law, following *Prentice*, and which is the general test in most other common law jurisdictions.[63]

[59] See para 3.150 above.

[60] See paras 4.38-4.41 above.

[61] See para 4.42 above.

[62] Cf the formulation of Sheriff GH Gordon, cited in para 3.57 above: "What a damn stupid way to [behave]".

[63] See paras 3.48-3.58 above.

5.64 We invite comment on how far it is possible and desirable to spell this test out in more detail. We are inclined at present to think that any attempt at further formalisation, at least by statutory means, will inhibit the general judgment which would seem to be the only feasible basis of the present offence. There are, however, three points which appear to require specific consideration, and on which we invite opinion.

Some specific considerations

5.65 First, just as the standard of behaviour is that to be expected of a person with the defendant's attributes, skills and (perhaps most importantly) professional or vocational pretensions and responsibilities,[64] so the question whether he has *seriously* fallen below this standard is to be judged against the same background. Here again, therefore, professional evidence will be relevant. The various cases in *Prentice* give some practical guidance as to how that test will operate at least in cases of professional negligence. The conduct of Dr Adomako was regarded as insupportable in any person professing to be an anaesthetist,[65] whereas the conduct of Drs Prentice and Sullman, although involving a risk of the gravest sort,[66] was, in the context in which those two individual doctors found themselves, not seriously below what could reasonably have been demanded *of them*.[67] In this respect, the test we propose may not differ much from the practical effect of at least one aspect[68] of the law laid down in *Prentice*. We suggest, however, that in perhaps less clear cases it will be easier to see the implications of this test if it is formulated in the terms proposed above, rather than simply as a matter of "gross negligence".

5.66 Secondly, however, it has to be remembered that under the formulation which we propose the question of the accused's standard of conduct only arises at all in circumstances where he should have been aware of a significant risk of death or serious injury to another.[69] The presence of such a risk influences judgment as to the conduct which can reasonably

[64] See para 5.60 above.

[65] See para 3.150 above.

[66] See para 5.56 above.

[67] The court in *Prentice* instanced many circumstances which explained or mitigated the mistake of the doctors who were the actual defendants in that case. We may quote from the summary at [1993] 3 WLR 927, 942G-943B:

> ...the responsible consultant had given Dr Prentice no instruction; Dr Prentice was a very young doctor, reluctant to do the operation and untrained in the special implications of lumbar puncture, who thought that all aspects of the process were to be supervised by Dr Sullman; Dr Sullman by contrast thought that he was simply supervising the physical performance of the injection by an inexperienced houseman, and not taking responsibility for what was injected; there was no data chart available; the senior nurse was not present, having left only two students present; and it was accepted that the practice (apparently, that of the hospital) of allowing two syringes containing respectively drugs safe for and not safe for lumbar injection on to the same trolley was bad, and was (by the time of the trial) no longer followed.

[68] On the "gross negligence" rationale of *Prentice*, see para 3.149 above.

[69] See para 5.57 above.

be expected to meet it. A higher standard of attention is to be demanded here than when, as in some aspects of the present law, the foreseeable risk is merely of injury to health, or is simply a "risk" without further specification.[70] Here again, therefore, we venture to suggest that the formulation proposed above will concentrate attention on the specific issue more clearly than does the single compressed concept of gross negligence.

5.67 Thirdly, a distinction has to be made between cases where the accused himself creates the risk and cases where he intervenes or ought to intervene in order to guard against a risk created by others.[71] As a matter of commonsense, more is to be demanded of the accused in the first case than in the second. We do not think that it is feasible to lay down separate rules for the two cases. We do, however, see merit in the two cases being separately identified, as they are in the formulation proposed in sub-paragraph 2 of paragraph 5.57 above.

5.68 Such a distinction will, in particular, put in context the possible difference between the conduct expected of, say, a doctor, and that of someone who creates his own risk. It will also make clearer, as the *Prentice* case demonstrated, that it would be unreasonable to expect too much of individuals placed in difficult situations, particularly by what may have been inadequate provision by their employers.[72] By contrast, a person who creates the risk may more properly be expected to take precautions against it. In the latter type of case, best demonstrated by the driving of a motor vehicle, the creation of the risk and its eradication are really one and the same issue.[73]

5.69 The present law does not make such a distinction with any clarity. This is demonstrated by the law which was applied in the *P&O* case, as discussed in paragraph 4.43 above. The *Bateman* test, which despite the explication of it in *Prentice* is still the basis of the present undifferentiated test of "gross negligence", is attached to the standards required of and internally monitored by a caring profession which, on the whole, intervenes to deal with risk rather than to create it. It may well not be appropriate in other contexts, such as those of industrial or transport operations, to regard the general standards of operators in meeting risks that they themselves had created as dispositive in deciding whether conduct within those standards that caused death was "gross" negligence. These considerations reinforce the suggestion advanced in paragraph 5.62 above that the

[70] See n 50 to para 5.49 above.

[71] This consideration was stressed, as a practical point, in *Prentice*: see para 3.138 above.

[72] See n 67 to para 5.65 above.

[73] This, as pointed out in *Prentice* [1993] 3 WLR 927, 936F is a prime reason why the *Lawrence/Seymour* test, conceived in a context of reckless driving, is inept when applied to alleged medical negligence:

> ...breach of duty cases such as those involving doctors are different in character. Often there is a high risk of danger to the deceased's health, not created by the defendant, and pre-existing risk to the patient's health is what causes the defendant to assume the duty of care with consent. His intervention will often be in situations of emergency.

approach suggested here at least leaves it open to the court to make a critical review of industry practices, in the context of a prior finding that those practices have created a significant risk of death or serious injury.

F. Punishment

5.70 The maximum penalty in all cases of manslaughter is life imprisonment. The current authority for that rule is section 5 of the Offences against the Person Act 1861; but in truth the rule survives unaltered and unreconsidered from 1829, the draftsman of the 1861 Act having simply reproduced the provisions of 9 Geo 4, c 31 section 9.

5.71 We invite comment on whether this rule should remain. For our own part we incline to think that there is unlikely to be any case of *negligent* manslaughter in which a maximum penalty of, say, ten years imprisonment was not sufficient. It might, however, be thought that life imprisonment should be retained for the very worst cases of manslaughter by subjective recklessness, as discussed in paragraphs 5.16-5.21 above.

G. Corporate liability for manslaughter

Introduction

5.72 We have already indicated above that we have to give specific consideration to corporate liability, because many of the recent incidents which have reawakened public interest in the law of manslaughter have concerned corporations, and the policy issues attaching to a law of manslaughter seem particularly pressing when the conduct of a corporation is under scrutiny. Before considering possible reforms in detail, however, we need to make one policy point clear at the outset.

5.73 We do not see any justification for applying to corporations a law of manslaughter which is different from the general law we have already expounded. That is to say, the question for this section of the Paper is how the general law of manslaughter may be applied in the particular circumstances of a corporation, and not whether standards and requirements should apply to corporations which are different from those which apply generally, that is to say to individuals. We are aware that there has been much criticism of what is alleged to be the reluctance of regulatory and prosecuting authorities to apply the general law, and in particular the health and safety laws, to corporations.[74] However, the remedy for such lapses, if they exist, is the proper enforcement of the law which is already to hand. It is wrong and misleading to think (and neither of the authors cited above do so suggest) that the safety of workers can be properly or fairly protected by a system which refrains from enforcing day-to-day safety requirements, but then imposes stringent and serious penalties in the cases in which disregard of those requirements leads

[74] See, eg Bergman, *Deaths at Work: Accidents or Corporate Crime* (1991); Wells, *Corporations and Criminal Responsibility* (1993), especially at pp 39-83.

to or contributes to death.[75] We invite comment on this proposition, but the rest of this Part proceeds on the basis we have indicated.

The difficulties of corporate liability

5.74 In paragraphs 4.5-4.20 above we explained the conceptual problems which have been found in attempts made by the courts to apply the criminal law to corporations. Critics have complained that the structure of the criminal law, whose concepts of mens rea and conscious intention or risk-taking assume the mechanisms of human, individual, choice and decision-making, are simply inept when applied to companies. This is the reason, it is suggested, for the failure to apply the criminal law effectively to damage and injury which occur in the course of companies' operations.[76]

5.75 The frustration which is undoubtedly felt at the complexities of the present law of corporate liability, and the inefficiency of the doctrines which have been developed to enforce such liability, have led to radical suggestions that a completely new legal regime should be specially developed for corporations. Put very briefly, this would not look for orthodox mens rea on the part of the corporation (or rather, somewhat artificially, on the part of one of its controlling officers), but would judge the corporation's liability post hoc, according to the steps which it had taken, after the accident, to prevent any recurrence. The test would not be the advance awareness of some person who might be identified to represent the company, but the reaction of the company itself, acting consciously through its authorised decision-making machinery, in correcting its practices, ensuring compensation, and generally acting as a responsible company should.

> Rather than struggling to establish some antecedent fault within the corporation, the prosecution would invite the court to infer fault from the nature and effectiveness of the company's remedial measures after it had been established that it was the author of a harm-causing or harm-threatening act or omission.[77]

5.76 This is a strikingly radical approach. Anyone who has had to contend with the obscurities of the present criminal law affecting corporations, only a very brief account of which is given in Part IV of this Paper, must feel considerable sympathy with the attempt to cut the Gordian knot in this way. We do not, however, consider that this project, limited as it is to one particular, and confessedly somewhat singular, crime, is the appropriate

[75] Some of the respondents to our Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (1993) LCCP 132, which was published in October 1993, have expressed quite strong views to us that it is the proper function of the criminal law, and not the function of the civil law through the mechanism of punitive damages, to punish corporations who break the law to the detriment of their employees or members of the public at large.

[76] Much material on this theme is contained in Ms Wells' recent book, *op cit* at n 4 to para 4.3 above; and see also the same author at [1993] Crim LR 551, 561-566.

[77] This theory is most fully expounded in a famous article by Fisse and Braithwaite, (1988) 11 Sydney LR 468. The most accessible summary of the theory is to be found in Ashworth, *Principles of Criminal Law* (1991) pp 86-88, from which the quotation in the text is taken.

occasion to consider a reform which would affect the whole of the criminal law. Nor, however, is it necessary to proceed that far in order to put corporate liability for *manslaughter* on a proper basis.

Corporate liability and manslaughter

5.77 We say this because the essential difficulty which has been experienced in the present law of corporations is that of attaching liability to corporations for crimes of *conscious* wrong-doing, as Ashworth points out in the extract above, when he is contrasting the radical scheme with the present law. But the crime of manslaughter described in this Part is not a crime of conscious wrong-doing at all;[78] rather, it is a crime of neglect or omission, albeit neglect or omission occurring in a context of serious (objective) culpability. It is in our view much easier to say that a *corporation*, as such, has failed to do something, or has failed to meet a particular standard of conduct than it is to say that a corporation has done a positive act, or has entertained a particular subjective state of mind. The former statements can be made directly, without recourse to the intermediary step of finding a human mind and a decision-making process on the part of an individual within or representing the company; and thus the need for the identification theory, in order to bring the corporation within the subjective requirements of the law, largely falls away.[79]

5.78 We provisionally propose, therefore, that there should be a special regime applying to corporate liability for manslaughter, in which the direct question would be whether the *corporation* fell within the criteria for liability for that offence which are described in paragraphs 5.57-5.64 above. In the following sections we set out, for critical comment, some details of how we would envisage this regime operating.

The corporation should have been aware of the risk

5.79 In discussing this requirement in the context of an individual, we suggested that it was a comparatively simple question, at least from the analytical point of view, to ask whether the accused should have been aware of a significant risk that his conduct could result in

[78] This is not so of manslaughter by subjective recklessness, paras 5.16-5.21 above. What follows below as to corporate manslaughter applies only to what we have called a general law of manslaughter, based on a version of objective negligence. Subjective manslaughter, insofar as it affects companies, will continue to be adjudicated on according to the general principle of identification described at paras 4.11-4.14 above. This, however, is not unreasonable, because the crime depends on significantly culpable conscious running of a risk. For *that* liability to attach to a corporation, conscious decision-making by a senior officer would seem to be required.

[79] Compare, in this, the comparative ease with which the law has been able to attribute offences of strict liability to corporations: see para 4.10 above. Our approach, described below, does not entail the imposition of *strict* liability, because it demands, as does the general law of manslaughter, the presence of (seriously culpable) *negligence*. It does, however, share with strict liability an absence of the need to show *subjective* fault on the part of the corporation. The importance of focusing on offences not requiring subjective proof of guilt in attributing liability to corporations was also recognised by the Committee of Ministers of the Council of Europe Recommendation to Member States (No R (88) 18 of 1988), especially in recommendations 2 and 3a, and para 7 of the accompanying Explanatory Memorandum.

death or serious injury.[80] The question in the case of a corporation may take more investigation to answer, but in itself it is similarly straightforward, although (to an extent which is more apparent than in the case of an individual) it invites judgment of the corporation's organisation and activities.

5.80 A corporation only finds itself even potentially exposed to the question whether it should have been aware of a significant risk because it chooses to conduct the particular operation in which that risk arises: running a transport system, or a factory, or (in a connection we mention below) a hospital. No corporate body can find itself in this position by accident. It decides, by whatever mechanisms effectively take decisions on behalf of the company, to engage in those activities, usually, although not inevitably, for the profit of the company and, through the company, of its owners. These decision-making mechanisms may be very complex, and will vary from case to case. In any individual case, deciding on the relevant mechanisms or persons responsible for decision making will be a question of fact, and will not depend on legal doctrines such as the principles of identification or aggregation. The question then simply is whether those responsible for taking these decisions should have been (not actually were) aware of a significant risk that those operations, either at their commencement or during their continued pursuit, could result in death or serious injury.

5.81 Where the operations are inherently hazardous, either to the public or, more likely, to employees, for example in the operation of a coal mine, then the question will answer itself. Where the issue is less clear, the nature of the company's operations and their degree of hazard will have to be gone into in some detail. The type of issue which will have to be considered can again be illustrated from the *P&O* case.

5.82 The evidence in that case included that of one or two masters of vessels owned by the company, other than the *Herald*, on which open door sailing had occurred in the past (with, one would have thought, a clear risk of the occurrence which happened to the *Herald*). Those masters had realised that the system might be improved, but

> ...those concerns were never exported from the particular vessel in which those incidents occurred... . So those incidents were never exported either to the company, viewed as an aggregate, or- and importantly- to the other vessels operating in the fleet. Consequently, to Masters other than those to whom I have just been referring the risk that has been talked about in this case simply did not occur. Specifically, in evidence in this court, to none of the Masters- even those who had been privy to previous open-door incidents- did the possibility of an open-door sailing present itself as something which was remotely possible in real life.[81]

[80] See para 5.58 above.

[81] *R v Stanley and others* 19 October 1990 (CCC), transcript pp 3-4. See also the citations at para 4.41 above.

5.83 These observations were made in the context of an enquiry into the question, required by the law as it then stood, of whether the risk was "obvious and serious".[82] But we suggest, on the first issue of risk, that the question should more properly be whether the *company* should have been aware of the risk, because it is the company which is in a position to do something about it. Once there is evidence that employees have perceived a risk, even a small one, of serious consequence, it will then be appropriate to look critically at the company's systems for transmitting that knowledge to the appropriate level of management, and for acting on the knowledge received. Similarly, even in a case where no actual appreciation of the risk can be shown, there will be cases, particularly where the failure to appreciate the risk has resulted in deaths which it is difficult to describe as wholly accidental, where it is appropriate to look at the company's management and management systems, to see whether, having taken on the enterprise in the first place, it has applied the necessary skills and systems to the task, including the employment and training of operatives capable of identifying and responding to risks that arise.

5.84 In this respect, therefore, reference to the company's organisation, attitude and concern for safety in general will be relevant. In deciding the first question, whether a company *should* have been aware of the risk attaching to its operations, considerations such as those pointed to by the Sheen enquiry in the context of the *Herald of Free Enterprise* disaster[83] may well be thought to be of some importance. This, in its turn, may require an enquiry of some extent and detail; but this is inevitable if the (very significant) issue of responsibility for death is to be properly investigated.

The corporation's conduct fell seriously and significantly below what could reasonably have been demanded of it in dealing with that risk

5.85 What we have said so far goes only as to risk. The more pressing issue, however, as in the case of manslaughter by an individual, is how the company behaved in the context of that risk: that is, the application to the company of the second limb of the test described in paragraph 5.57 above.

5.86 Once we have abandoned the identification theory, or indeed any other anthropomorphic characterisation of a corporation, the structure of this enquiry becomes comparatively simple, although the application of the law in practice will inevitably require some hard decisions.

5.87 The basic premise is that the company is required to arrange its affairs in a way which is reasonable granted the presence of the risk. This requires investigation of how the company operates to prevent death or injury. The distinction between the creation of a risk, and the meeting of a risk from outside, stressed in paragraphs 5.67-5.68 above, will be very important in this context. If a corporation has chosen to enter a field of activity,

[82] See para 4.40 above.

[83] See para 4.42 above.

it has a clear duty to those affected by that field of activity to take steps to avoid the creation of serious risks, in the same way as it is easy to see in the case of a motorist that choosing to sit behind the wheel imposes serious obligations of care.[84] In such a context, the steps taken by the company to discharge that duty of safety, and the systems which it has created to run its business, will be directly relevant. Courts may expect to be invited to consider the company's overall performance in that regard, as was revealingly done by the Sheen enquiry.[85]

5.88 A further example of such a type of enquiry inevitably suggests itself. It is difficult to read the background facts to the cases of Drs Prentice and Sullman which were summarised by the Court of Appeal[86] without feeling some concern about the general operational structure in which the two doctors found themselves working; the apparent lack of adequate support, both at consultant and at nursing level; and the presence of at least one hospital practice which was agreed to be insupportable. In that context it would have been quite wrong, as the Court of Appeal concluded, to say that the two individual doctors had fallen seriously and significantly below the standard which could reasonably have been demanded of *them*, but what of the hospital or the hospital authority? Without making any judgment, in the absence of a full review of the evidence, we can at least point out that if *corporate* liability were investigated in such a context the failings to which the court pointed in *Prentice* would not be, as in the case against the individuals, exculpatory, but would be directly relevant to the question whether the corporate body had fallen seriously below the necessary standard.

5.89 The standard has to be that of society, and not necessarily that of the body whose conduct is under investigation.[87] The jury in applying that standard will have to be warned against assuming that there has been a serious derogation from the standard just because a death has occurred. It will also, and particularly, have to remember that whereas with the most elaborate precautions almost any event can be prevented from occurring, at the same time life, in the shape of medical treatment or transport services, must proceed without being unreasonably hampered by excessive requirements of the criminal law. Whether it was reasonable to do things differently will be much influenced by considerations of this kind. At the same time, however, a conscious and reasoned decision to operate in a certain way, even if this entails some risk, because of the perceived benefits of that operation, is likely to be more compelling as an explanation than that the company was simply infected with the disease of sloppiness.

5.90 Above all, the final and protean question remains the same as the first question: did the company's operation fall seriously and significantly below what could reasonably be

[84] See n 73 to para 5.68 above, and the passages from the judgments of the House of Lords in *Reid* referred to in n 269 to para 3.158 above.

[85] See para 4.42 above.

[86] See n 67 to para 5.65 above.

[87] See para 5.47 above.

expected of it in the context of the significant risk of death or injury of which it should have been aware?

H. The punishment of corporations

5.91 It is sometimes suggested that the imposition of liability for serious crimes, such as homicide, on corporations is nugatory, because corporations cannot be imprisoned. This has led, in the new general theory of corporate liability described in paragraph 5.75 above, to some inventive suggestions for corporate probation, or for the imposition of penalties something like those operating in market regulatory systems. Our proposed law of corporate manslaughter has to work within the present system. We do not, however, accept that a merely monetary penalty, coupled with the stigma that a conviction of a homicide offence brings with it, will be of no effect. In a case which merits it, the penalty should be and can be sufficient to bring home to those who own and control the company their responsibility for its proper conduct, and their responsibility for its behaviour as a good citizen.

5.92 Somewhat similarly, it is sometimes suggested that sanctions will only be effective if they are allied to punitive sanctions, in terms of imprisonment, on company officers. This, however, would not be appropriate as a feature of the law which we propose above, which deliberately stresses the liability of the *corporation* as opposed to its individual officers. Here again, however, we would expect a conviction for manslaughter to lead to the most searching enquiry by the company and its owners as to the responsibility for it, and its owners by their association with it being implicated in the serious offence of homicide. We are confident that no respectable company or organisation would leave in place systems or the people responsible for the operation of systems which had been condemned by a jury under the test which we propose above: a test which goes out of its way to seek to ensure that liability is only imposed in serious cases which display a marked failure to reach reasonable standards.

PART VI

SUMMARY OF OUR PROVISIONAL PROPOSALS

6.1 We invite comments on any of the matters contained in, or on the issues raised by, this Consultation Paper. For convenience, we summarise here our provisional proposals, together with specific issues on which we should particularly welcome comment.

A. Unlawful act manslaughter

6.2 For the reasons set out at paragraphs 2.53-2.56 and 5.1-5.7, we provisionally propose the abolition of this head of manslaughter. We invite comment from any readers who think that it should be retained, and if so we ask them to state with clarity what form they believe the law should take, bearing in mind all the difficulties to which we have drawn attention in Part II.

6.3 Despite our provisional view that unlawful act manslaughter should be abolished, in paragraphs 5.8-5.9 we seek the views of consultees on the question whether there is a feeling prevalent amongst the general public that where a person has caused the death of another by an act of violence, he or she should be dealt with more severely because of the accident that death was caused by that act; and whether this feeling should properly influence the criminal law. In case consultees answer both these questions in the affirmative, in paragraph 5.12 we provisionally suggest an offence of causing death in the following terms:

> A person is guilty of an offence if he causes the death of another intending to cause injury to another or being reckless as to whether injury is caused.

We seek the views of consultees on the advisability of creating an offence of this type, on the formula we have provisionally suggested, and, in paragraph 5.15, on the level of penalty which such an offence should attract, and on an appropriate name for the suggested new offence.

B. Manslaughter by subjective recklessness

6.4 We provisionally propose a separate category of reckless manslaughter, defined in terms of a person causing the death of another while being subjectively reckless whether death or serious personal injury would be caused. "Recklessness" would bear the same meaning as that adopted in the Draft Code and in clause 1(b) of our Report on Offences against the Person,[1] that the accused was aware of the risk that death or serious injury would occur, and unreasonably took that risk: see paragraphs 5.16-5.21 for the reasoning behind this proposal.

[1] Law Com No 218 (1993).

C. Motor manslaughter

6.5 For reasons set out in paragraphs 5.22-5.23, we do not think the present law of manslaughter while driving a motor vehicle is satisfactory. However, we invite comment from any reader who considers that the present law should remain unamended.

6.6 The first of our alternative proposals for reform is the disapplication of the offence of gross negligence manslaughter to killings by use of motor vehicle altogether, leaving the statutory offence of causing death by dangerous driving, and our proposed offence of manslaughter by subjective recklessness, as the only possible charges in such a case: see paragraphs 5.25-5.26.

6.7 The other alternative proposal is the reversal of the decision in *Seymour*, which held that *Caldwell* recklessness was the mental state required for motor manslaughter. The effect of this provisional proposal, discussed at paragraphs 5.27-5.29, would be to bring motor manslaughter within the general law of manslaughter (for which we make provisional proposals summarised in the following paragraphs).

D. The general law of manslaughter

6.8 The first issue, discussed at paragraphs 5.31-5.35, on which we invite comment is whether there should be a law of involuntary manslaughter at all.

6.9 Secondly, if it is accepted that there should be a law of involuntary manslaughter, should it extend beyond the category of subjectively reckless killing? This issue is discussed at paragraphs 5.36-5.43.

6.10 Thirdly, if consultees accept the legitimacy of a general offence of manslaughter not limited to conscious risk-taking, we invite comment on the appropriate form of such an offence. We make various provisional proposals with regard to this issue, which are summarised in the following paragraphs.

6.11 For reasons which should be apparent from our account of the existing law in Part V of this Paper, summarised at paragraph 5.48, we propose that a fresh start, the enactment of a new offence, is required.

6.12 In paragraph 5.45, we suggest that it would be inappropriate to formulate separate tests targeted at different types of activity (for example, a doctor treating a patient or a ships captain sailing a vessel). Instead we provisionally propose that a single offence should apply equally to all forms of activity.

6.13 In paragraph 5.57 we summarise the elements of that offence:

1. The accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury.

2. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.

Whilst we invite general comment on this provisional formulation, the following particular issues (discussed in paragraphs 5.49-5.74) arise in connection with it:

6.14 Is it appropriate that the offence should be formulated in terms of a significant risk of serious injury as well as of death?

6.15 Will the fact that death occurred lead juries inevitably to assume that there must have been a serious risk of what in fact happened?

6.16 Is it appropriate that the risk should be defined as "significant" or "substantial", rather than, perhaps, "obvious"?

6.17 We do not believe that the proposed requirement that the accused's conduct "fell seriously and significantly below what could reasonably have been demanded of *him*" would exclude a critical review of the practice and attitudes of an industry as a whole. Is this approach valid, and, if so, should it be made explicit in any legislation?

6.18 The proposed formula avoids the terminology of "gross negligence" and "recklessness" and instead requires that the accused's conduct "fell seriously and significantly below what could reasonably have been demanded of him". How far is it possible and desirable to spell out this test in more detail?

6.19 We particularly invite comment on the specific considerations affecting this provisional offence, which are set out in paragraphs 5.65-5.69.

E. Punishment

6.20 The present maximum penalty in all cases of manslaughter is life imprisonment. At paragraph 5.71 we suggest that a maximum penalty of ten years would be sufficient for negligent manslaughter, although life imprisonment should be retained for manslaughter by subjective recklessness. We invite comment.

F. Corporate liability for manslaughter

6.21 In paragraph 5.73 we suggest that there is no justification for applying to corporations a different law of manslaughter from that which would apply to natural persons.

6.22 We provisionally propose a special regime applying to corporate liability for *manslaughter*, in which the direct question would be whether the *corporation* fell within the criteria for liability of the offence summarised at paragraph 6.13 above. The detailed application of this regime is discussed at paragraphs 5.79-5.90. We invite comment on all aspects of this discussion.

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